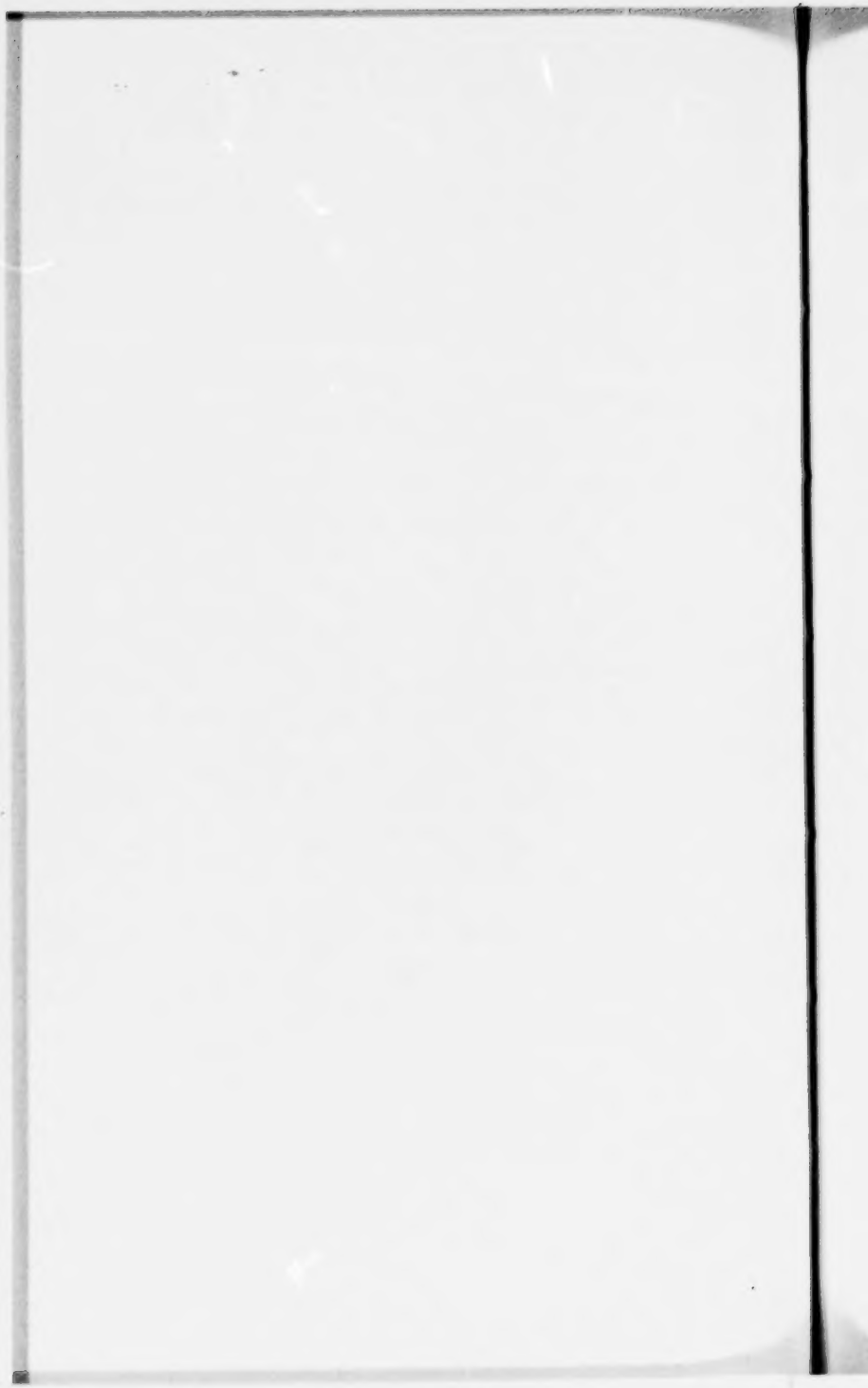

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-550

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OCTOBER TERM, 1972

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CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Court of Appeals for the Fourth Circuit are reported at 462 F.2d 1058 and are reprinted at pp. 557-602 of the Appendix to the Petition for Writ of Certiorari filed by the School Board of the City of Richmond, Virginia, et al., in No. 72-549.[1] The opinion of the

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[1] Citations in this brief in the form "A. ——" refer to the Joint Appendix filed by Petitioners in this case and No. 72-549. Trial exhibits are designated "PX" for plaintiffs', "RX" for the Richmond School Board's, "CX" for exhibits of the Chesterfield School Board or Board of Supervisors, "HX" for exhibits of the Henrico School Board or Supervisors, and "SX" for exhibits of the State Board of Education and State Superintendent of Public Instruction. In addition, citations to exhibits reprinted as part of the Appendix in a separate volume are given in the form "Ex. A. —". Citations in the form "Pet. A —" refer to the separate Appendix

United States District Court for the Eastern District of Virginia rendered on January 5, 1972 and its implementing order entered January 10, 1972 are reported at 338 F. Supp. 67 and are reprinted in the same Appendix at pp. 164-545.

Other opinions and orders of the courts below related to this litigation are reported or reprinted as follows:

1. District Court opinion and order entered August 17, 1970, approving interim plan of desegregation for Richmond, reported at 317 F. Supp. 555 and reprinted at Pet. A. 1-47.

2. District Court opinion and order entered December 5, 1970, granting motion for joinder of additional parties defendant and directing the filing of an amended complaint, reported at 51 F.R.D. 139 and reprinted at Pet. A. 48-57.

3. District Court opinion of January 8, 1971 denying motion to recuse, reported at 324 F. Supp. 439 and reprinted at Pet. A. 58-90.

4. Unreported District Court order of January 8, 1971, as entered *nunc pro tunc* January 13, 1971, on pre-trial motions, reprinted at Pet. A. 91-93.

5. Unreported District Court order of January 13, 1971 on additional pre-trial motions, reprinted at Pet. A. 94-97.

6. District Court opinion of January 29, 1971, denying motion to implement further desegregation at midyear and continuing pendente lite construction injunction in effect, reported at 324 F. Supp. 456.

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of Opinions Below and relevant state statutes filed with the Petition in No. 72-549. Citations to portions of the record not reprinted in the Joint Appendix are given by volume number and page, e.g., "28 R. 713." Transcripts of earlier hearings are cited by date and page.

7. District Court opinion and order entered February 10, 1971, declining to convene three-judge court, reported at 324 F. Supp. 396 and reprinted at Pet. A. 98-106.

8. District Court opinion and order entered February 10, 1971 denying motion to dismiss as to certain defendants in their individual capacities, reported at 324 F. Supp. 401 and reprinted at Pet. A. 107-09.

9. District Court opinion and order entered April 5, 1971 approving further desegregation plan for Richmond schools, reported at 325 F. Supp. 828 and reprinted at Pet. A. 110-55.

10. Unreported District Court opinion and order entered July 20, 1971 denying renewed motion to convene three-judge court, reprinted at Pet. A. 156-62.

11. Unreported District Court order entered September 15, 1971 denying evidentiary motion, reprinted at Pet. A. 163.

12. Unreported District Court opinion and order issued January 19, 1972 denying stay of January 10 order, reprinted at Pet. A. 546-52.

13. Court of Appeals order granting partial stay of District Court decree, entered February 8, 1972, reported at 456 F.2d 6 and reprinted at Pet. A. 553-56.

14. Amended judgment of the Court of Appeals, entered August 14, 1972, reprinted at Pet. A. 603.

Other reported opinions in this case are as follows: 317 F.2d 429 (4th Cir. 1963); 345 F.2d 310 (4th Cir.), *rev'd* 382 U.S. 103 (1965).

Jurisdiction

The opinion of the Court of Appeals was entered June 5, 1972 and its amended judgment filed August 14, 1972. On August 29, 1972, Mr. Justice Marshall extended the time within which a Petition for a Writ of Certiorari might be filed to and including October 5, 1972. The Petition was filed on October 5 and was granted on January 15, 1973. On the same date, this case was consolidated with No. 72-549 by order of the Court. The Court's jurisdiction rests upon 28 U.S.C. §1254(1).

Question Presented

Is the constitutional power of a federal court to remedy racial discrimination in the public schools confined within the geographic boundary lines of a single State-created school district in the absence of a showing of racial motivation in the drawing of the district lines?

Constitutional and Statutory Provisions Involved

The case involves the application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This matter also involves the Tenth Amendment to the Constitution of the United States, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Various provisions of Virginia's Constitutions of 1902 and 1971 and Virginia statutes relating to education are set out at Pet. A. 604-23. These are: Constitution of 1902, §§ 129, 130, 132, 133; Constitution of 1971, Art. VIII, §§ 1-7; Va. Code Anno. §§ 22-1, -2, -7, -30, -34, -100.1 through -100.12 (Repl. 1969); Va. Code Anno. §§ 22-1.1, -2, -7, -21.2, -30, -32, -100.1, -100.3 through -100.11, -126.1, -127 (Supp. 1972).

Statement

The basic issue in this case is whether the remedy proposed by the Richmond School Board and adopted by the district court to end racially identifiable schools in the greater Richmond area was beyond the power of the district court in view of its findings that the Richmond school system, as well as the Henrico and Chesterfield County school systems, were in violation of the Fourteenth Amendment in 1970 (when the county school authorities were joined as defendants) and at the time of final decision by the district court. We begin by describing the extent and the history of the public school segregation that the district court undertook to remedy.

I. Segregation in the Schools of the Greater Richmond Area

In 1961, at the commencement of this litigation, the schools administered by the Richmond, Chesterfield and Henrico School Boards were completely segregated. A decade later, the district court found that the same boards were still operating non-unitary systems (338 F. Supp., at 103-04, 70-72, 78-79, 169-71, 174-76, Pet. A. 237-38, 165-69, 183-84, 383-86, 393-97):

During the school year 1970-71 (when the Chesterfield and Henrico boards were added as defendants [see pp. 38-

41 *infra*]), the School Board of the City of Richmond administered 54 regular school facilities.[2] Twelve schools enrolled more than 70% white students, including six schools which were more than 90% white (RX 30; 338 F. Supp., at 232-33, Pet. A. 522-23). Four schools were attended solely by black students, an additional eight by more than 95% black students, and another three by more than 90% black students (*ibid.*). Thus, in a system of 47,988 pupils, 64.2% of whom were black (RX 75, Ex. A. 21; Pet. A. 417), nearly one-quarter of the schools were more than 70% white (half of these more than 90% white) and another quarter of the schools enrolled in excess of 90% black students.[3]

During the same 1970-71 school year, the Chesterfield County School Board operated 39 schools, of which nineteen were more than 90% white and one over 99% black (PX 115; 338 F. Supp., at 234-36, Pet. A. 524-26). The black school retained an all-black faculty while six other Chesterfield County schools had no black faculty members, and an additional nine schools had only one black faculty

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[2] Excluding programs and classes for handicapped, special education students, etc.

[3] This was the result obtained from the implementation of a partial plan of desegregation limited to the City schools pursuant to an August 17, 1970 decree of the District Court (Pet. A. 1-47). In comparison, during the 1969-70 school year, prior to the issuance of the first judicial decree in this lawsuit which required the City School Board to assign students mandatorily to achieve desegregation (see pp. 36-37 *infra*), the City Board operated 61 facilities: 22 were all-black and six others more than 90% black; two were all-white and 17 more than 90% white; and faculties were similarly segregated (RX 30; 338 F. Supp., at 232-33, 240-42, Pet. A. 522-23, 530-32, 6-7).

member (PX 102; 20 R. 132a-35, 338 F. Supp., at 170, 234-36, Pet. A. 384, 524-26).[4]

During the 1970-71 school year, the Henrico County School Board was responsible for the operation of 39 schools. Twenty-eight were more than 90% white but Central Gardens Elementary School was over 96% black, and enrolled more than two-fifths of all black elementary students residing in the system (PX 116; 338 F. Supp., at 175, 237-39, Pet. A. 395, 527-29). Central Gardens had the largest proportion of black faculty members of any facility operated by Henrico, while ten schools had no blacks on their faculties and another 20 had only one black staff person (PX 116; 338 F. Supp., at 176, 237-39, Pet. A. 397, 527-29).[5]

To summarize, of 132 schools operated during the 1970-71 year by the three local boards, 53 had student bodies more than 90% white; 17 schools were more than 80% black.[6] All but three of the black schools were located within the City of Richmond,[7] and all but six of the 90%-

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[4] During the 1968-69 school year, Chesterfield operated 9 all-black schools, and during the 1969-70 school year, 5 all-black or virtually all-black facilities (PX 115; 338 F. Supp., at 234-36, Pet. A. 524-26). The reduction in number was brought about by closing the black schools as part of an HEW-approved plan (PX 118, pp. 214, 217-18).

[5] Henrico in 1968-69 had 5 all-black or more-than-90%-black schools (PX 116; 338 F. Supp., at 237-39, Pet. A. 527-29). Four of these five schools were closed at the end of the 1968-69 school year after HEW commenced enforcement proceedings, leaving Central Gardens virtually all-black during the 1969-70 and 1970-71 years (*ibid.;* PX 120, pp. 318-19, 321-22).

[6] The overall student population was 33.7% black, a change of only one-tenth of one percent from the figure of the previous decade (RX 78; Ex. A. 26; Pet. A. 418).

[7] One black school was administered by the School Board of Richmond but located in Henrico County; another black school facility was located partly within Henrico County (338 F. Supp.,

white schools in the surrounding counties.[8] Schools of substantially differing racial composition were located within reasonably short distances of each other (two to five miles): in most instances, the boundary line between the Richmond and county systems fell between them. The following Table comparing the enrollments of neighboring Richmond and Henrico schools by race in 1970-71 is illustrative:

TABLE 1[9]

Enrollments of Selected Richmond and Henrico Schools, 1970-71, and Distances Between Them

Richmond		*Distance (miles)*	*Henrico*	
School	*% Black*		*School*	*% Black*
Armstrong High	75%	5.0	Highland Springs High	13%
Kennedy High	93%	4.9	Henrico High	4%
John Marshall High	73%	1.4	Henrico High	4%
Mosby Middle	95%	3.6	Fairfield Jr. High	18%
East End Middle	68%	3.6	Fairfield Jr. High	18%
Fulton-Davis Elem.	53%	1.8	Montrose Elem.	0%
Mason Elem.	100%	3.1	Adams Elem.	14%
Highland Park Elem.	90%	1.3	Glen Lea Elem.	1%
Stuart Elem.	91%	2.2	Laburnum Elem.	20%

Because of the 1970 annexation of a portion of Chesterfield County containing several white schools, the new Rich-

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at 172, Pet. A. 388; *cf.* 24 R. 69; PX 117, 338 F. Supp., at 164, Pet. A. 371 [1954 request by Richmond Board for permission of Chesterfield Supervisors to build white Richmond high school in the county]; A. 581; PX 120; 338 F. Supp., at 172, Pet. A. 388 [1957 action of Henrico Board directing its Superintendent to negotiate with Richmond to permit Henrico black students to attend Richmond schools]).

[8] Approximately 85% of all black pupils in the area were assigned to schools administered by the Richmond Board.

[9] Derived from PX 97, 97A; *see* 338 F. Supp., at 190, Pet. A. 428-29; 23 R. 30-36.

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mond-Chesterfield boundary line did not separate Richmond and Chesterfield schools of markedly different racial composition during the 1970-71 school year. However, the previous boundary line fell between such schools. For example, Richmond's Franklin Elementary School (100% black in 1969-70) is shown by the maps (RX 64, Ex. A. 27) utilized by the Richmond School Board in presenting its proposed plan (see pp. 46-48 *infra*) to have been within three miles of the sites of Chesterfield County's Green Elementary School and Redd Elementary School (100% white and 92% white, respectively, in 1969-70).

The decree proposed by the Richmond School Board and approved by the district court to disestablish these segregated schools is described more fully below (see pp. 42-49 *infra*). It suffices here to note that that decree—whose lawfulness is the issue before this Court—sought to desegregate all of the schools, no matter which side of the boundary lines they fell. The decision of the Court of Appeals reversing that decree and restricting the desegregation process to the Richmond side of the boundary lines essentially perpetuates the pre-1971 pattern of black Richmond schools closely adjoining white county schools, as illustrated by Table 2. Indeed, there would be an even greater number of schools of substantially differing racial composition located within short distances of one another, separated by the Richmond boundary:

TABLE 2

Enrollments[10] *of Selected Schools Adjoining Each Other On Either Side of Richmond Boundary*

Richmond School		*County School*	
School	*% Black*	*School*	*% Black*
Armstrong High	72%	Highland Springs High	13%
Kennedy High	88%	Henrico High	4%
John Marshall High	78%	Henrico High	4%
Mosby Middle	86%	Fairfield Jr. High	18%
East End Middle	66%	Fairfield Jr. High	18%
Fulton Elementary	50%	Montrose Elem.	0%
Mason Elementary	83%	Adams Elem.	30%
Highland Park Elem.	84%	Glen Lea Elem.	30%
Stuart Elem.	79%	Laburnum Elem.	20%
Wythe High	57%	Manchester High	5%
Elkhardt Middle	45%	Providence Interm.	2%
Broad Rock Elem.	57%	Falling Creek Elem.	0%
Oak Grove & Annex Elem.	42%	Chalkley Elem.	5%
Southampton Elem.	68%	Crestwood Elem.	1%
Fisher Elem.	68%	Bon Air Elem.	3%

[10] The record contains 1971-72 enrollment data only for the Richmond schools together with projected 1971-72 enrollments for the schools paired with Central Gardens in Henrico County. The figures listed for the other county facilities are those of the 1970-71 school year, the latest in the record. We believe the significance of the comparison for 1971-72 remains substantially accurate since neither county planned any change in method of pupil assignment between 1970-71 and 1971-72 (with the exception of the attempt to sever all formal ties between the Chesterfield County School Board and the Matoaca Laboratory School [A. 1021-24] and the Central Gardens pairing [RX 88; A. 961], the results of which are reflected in the Table). We further note that the same comparison was made by the Court of Appeals in connection with its conclusion that when the two steps referred to parenthetically above were taken, each of the county systems would be "unitary," as the Court of Appeals used that term (462 F.2d, at 1065, Pet. A. 571-72).

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The net result of the Court of Appeals' ruling is that, out of 131 schools which would now be operated by the three local boards, 44 would be attended by more than 90% white students, and 11 by more than 80% black students. *All* of the black schools would be part of the Richmond system, and *all* of the white schools would be in the counties.

A. *Maintenance and Expansion of the Dual School Systems*

1. Delays in Compliance with *Brown*

The development of identifiable white schools and black schools within the greater Richmond area was not adventitious. Prior to *Brown* v. *Board of Education*, 347 U.S. 483 (1954), Virginia's public schools were racially segregated by statute. Following *Brown*, none of the three school boards in the Richmond region made any move to end their traditional segregatory practices until required to do so by either judicial or administrative proceedings.[11] In both Richmond City and Chesterfield County, the first modification of the pre-*Brown* form of dual system resulted from federal judicial decrees requiring the local boards and the State's pupil placement agency (see p. 19 *infra*; Appendix E *infra*) to allow certain individual black pupils to transfer to white facilities from the black schools to which they had been assigned. In Henrico, no desegregation occurred until after the passage of the 1964 Civil Rights Act (PX 115, 116, 120; 338 F. Supp., at 173, Pet. A. 390-91;[12] 317 F.2d 429 [4th Cir. 1963]; *McLeod* v. *County*

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[11] This is not surprising in light of the encouragement local authorities were given by State officials to resist compliance with the law (see p. 21 *infra*).

[12] The ruling of the District Court (338 F. Supp., at 67-248, Pet. A. 164-545) contains extensive detailed findings of fact (338 F. Supp., at 116-230, Pet. A. 185-532) including specific findings as to matters about which there is little dispute, such as the time when the first desegregation occurred. The District Court on several occasions expressed its dismay that such factual matters

School Bd. of Chesterfield County, Civ. No. 3431 [E.D. Va.]).

From 1954 to 1966, the Richmond School Board persisted in maintaining all its policies and practices of the pre-*Brown* era except insofar as judicial decrees required their abandonment. White students and black students were assigned to white schools and black schools, respectively, without any change until 1961. At that time, pursuant to a federal court decree, black children who complied with pupil placement procedures were permitted to transfer to white schools but initial assignments by the School Board continued to be made on a segregated basis.

In 1966 the Richmond Board agreed to a consent decree in this litigation which, while embodying a freedom-of-choice plan of pupil assignment, also committed school authorities to examine other methods of student assignment if significant desegregation did not occur. No such action was ever taken. Yet in 1970, after a motion for further relief had been filed, the School Board conceded that its free choice plan did not meet constitutional requirements[12] (338 F. Supp., at 70-72, Pet. A. 165-69). The Board then embraced a plan based strictly on geographic zoning, although aware of the drastic residential segregation within the City of Richmond (338 F. Supp., at 74-75, Pet. A. 173-76). Not until 1971-72 did the Richmond Board propose a plan of mandatory, race-conscious pupil assignments to all Richmond schools for desegregation (338 F. Supp., at 78-79, Pet. A. 182-83; Pet. A. 119-27).

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could not be stipulated (*e.g.*, 25 R. 14, 62) but since they were not, undertook to make the requisite specific findings. For this reason, and given the enormity of the record and the necessity to limit the Joint Appendix, insofar as possible, to manageable dimensions, we shall from time to time refer the Court to the lower court's findings on factual matters rather than the record.

[12] *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968).

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Faculty and staff continued to be assigned to particular schools on the basis of their race and that of the student body (338 F. Supp., at 72, Pet. A. 168-69);[14] affirmative reassignments of faculty and staff in a manner designed to eradicate the racial labelling of schools accomplished through past practices did not commence until the 1970-71 school year.

The Richmond Board also promoted continuation of the dual system through the rapid transformation of schools from white to black. Prior to 1960, it had formally redesignated white schools as black. Thereafter, under its free choice plan, it acquiesced in the wholesale transfer of remaining whites away from schools of increasing black concentration.[15] School site locations continued to be chosen so as conveniently to serve predominantly one-race residential areas, or without consideration of the tendency of the locations to perpetuate or aggravate school segregation in view of pre-existing residential segregation (338 F. Supp., at 75-76; Pet. A . 177; 324 F. Supp. 456, 461-69).

Next door in Chesterfield County, the county school board and the Board of Supervisors had repeatedly memorialized their support of the various "massive resistance" tactics (see pp. 18-21 *infra*) developed and implemented by Virginia state officials to avoid school desegregation following *Brown* (PX 117, pp. 82, 97; PX 118, pp. 76-79, 82; 338 F. Supp., at 167-68, Pet. A. 377-81). The School Board

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[14] This pattern continued even after this Court *in this case* held the plaintiffs had standing to challenge continued racial faculty assignments, *Bradley* v. *School Bd. of Richmond*, 382 U.S. 103 (1965), and continued in substance even after the School Board pledged in the 1966 consent decree, see p. 36 *infra*, that it would take steps to desegregate faculties.

[15] See Chart from Richmond School Board's submission of "HEW" plan in 1970; 317 F. Supp. 855, and relevant testimony of Superintendent, 6/19/70 Tr. 248-53.

continued to refer to its schools as white schools and "colored schools" (A. 528; PX 93, 117; RX 92; 338 F. Supp., at 135-37, Pet. A. 307-12), and to assign faculties accordingly (see 338 F. Supp., at 234-36, Pet. A. 524-26).

Although a 1962 federal district court decree required the Chesterfield Board and the Pupil Placement Board (see p. 19 *infra*) to admit certain black pupils to the formerly white facilities for which they had made application,[16] the Board took no steps of its own to bring about any desegregation until after the passage of the 1964 Civil Rights Act.[17] It finally agreed in 1966 to adopt a freedom-of-choice proposal (PX 118; 338 F. Supp., at 168-69, Pet. A. 381) after having first sought to convince the Department of Health, Education and Welfare that the Chesterfield schools were in compliance with the Act because they were operated pursuant to the 1962 decree (which applied to the named plaintiffs only) (*ibid.*). That year the Board administered 47 schools, including an all-black secondary school serving the entire county and eight all-black elementaries (PX 115; 338 F. Supp., at 234-36, Pet. A. 524-26). These schools remained all-black while freedom-of-choice was in effect (*ibid.*). All faculties were completely segregated except for one white teacher at a black school, and one black teacher at a white school (*ibid.*).

In 1968, after having been advised by the Department of HEW that the school system faced termination of federal funding because of the failure of the free choice plan to

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[16] *McLeod* v. *County School Bd. of Chesterfield County*, Civ. No. 3431 (E.D. Va.).

[17] There were no further proceedings in the *McLeod* case after the 1962 decree, which was not accepted by the Department of Health, Education and Welfare as evidence of compliance with the Act. See text *infra*. Accordingly, the Department undertook Title VI enforcement.

bring about effective desegregation, the Chesterfield School Board proposed closing eight of the nine all-black elementary schools effective with either the 1968-69 or 1969-70 school year, and the establishment of geographic zones for the formerly white facilities (PX 118, pp. 214, 217-18). The ninth black elementary school was still all-black at the time of the hearing below (PX 115; 338 F. Supp., at 236, Pet. A. 526). While the faculties of the closed black schools were generally absorbed within the system, most of the principals were assigned to lesser positions at the white schools (20 R. 85-89, 105-09). Extensive segregation in the assignment of faculties is apparent through at least the 1969-70 school year (338 F. Supp., at 234-36, Pet. A. 524-26; PX 115).

A similar course of events occurred in Henrico County: continuation of segregation policies after 1954 (*e.g.*, PX 120, p. 141 [segregated faculty conferences]) together with expressions of support for the State's anti-desegregation efforts (*Id.* at p. 89; PX 121, at p. 83). The first desegregation in the county did not occur until after the passage of the 1964 Civil Rights Act; then, from 1965-66 through 1968-69 the schools were operated under a freedom-of-choice plan (PX 120, pp. 212, 218, 267, 285-89). Of 42 schools administered in 1966-67, four elementary schools and a county-wide secondary school remained all-black. Faculties were completely segregated. (338 F. Supp., at 237-39, Pet. A. 527-29). The Board of Supervisors denied assertions by HEW that county black schools were inferior facilities offering inadequate programs (PX 121, p. 15; 338 F. Supp., at 174, Pet. A. 392-93); but the School Board's response to the commencement of administrative proceedings to terminate federal funding to the county school system in 1968 was to propose the closing of all of these schools beginning in the 1969-70 school year, and the en-

largement of the zones for adjacent white facilities (PX 120, pp. 318-19, 321-22). The School Board did not propose to desegregate Central Gardens Elementary School although it was over 90% black (see 338 F. Supp., at 239, Pet. A. 529).

As late as the 1970-71 school year, two-fifths of Henrico's black elementary school students were assigned to the virtually all-black Central Gardens School, which also had the greatest concentration of black faculty members throughout the system (*Ibid.*; 23 R. 13). Indeed, while it was continuing to operate its other black facilities as late as the 1968-69 school year, the Board was increasing the black faculty component at Central Gardens as the number of black students increased (PX 116; 338 F. Supp., at 175, 238, Pet. A. 395, 529).

2. Perpetuation of the Dual System Through School Construction

The period since Brown has seen a steady increase in pupil population in the three divisions; from 1961 to 1971 alone, the number of pupils in the greater Richmond area increased by nearly 24,000 (RX 78, Ex. A. 26; 338 F. Supp., at 185, Pet. A. 418). School construction programs which responded to this growth extended and entrenched segregation in the public schools.

Virtually none of the new facilities built in any of the three school divisions since 1954 opened with any substantial degree of desegregation (HX 29; PX 116, 117; 338 F. Supp., at 232-42, Pet. A. 522-32; Answers to Interrogatories, 3 R. 653, 4 R. 10; 324 F. Supp., at 461-69). Indeed, applications submitted to the State Department of Education for approval of construction projects long after 1954 continued to characterize proposed facilities as intended for black or white students (RX 90, 92; PX 117, p. 133;

PX 118, pp. 107, 111-12, 116, 132, 137, 169; 338 F. Supp., at 127-38, Pet A. 289-313). No consideration was given, in the process of site selection, to the effect of placing new schools in residentially segregated settings. School construction and expansion in Henrico, for example, was repeatedly premised upon Negro population increases in specific areas of the county (RX 90; see 29 R. 167-80). And none of the new Chesterfield school construction in the planning stages at the time of trial in 1971 had been developed with any consideration of its effects upon desegregation (A. 494).

Virginia state officials' role in school construction was direct. Their approval of sites and building plans was required before bonds could be sold, state construction aid funds released, or facilities erected (21 R. 82, 89-92; PX 117, PX 122, pp. 63, 115-19, 158; RX 83, p. 26; 338 F. Supp., at 124-26, Pet. A. 283-86). The responsible state officials published a planning handbook designating criteria to be used by local administrators in evaluating plans for additional construction. But they did not require that the impact of proposed new construction in perpetuating segregation or retarding desegregation be considered.[18] While the State Superintendent did notify local officials of a 1968 judicial decision requiring that school planning take account of the effects of new locations upon desegregation,[19] that consideration was never incorporated into the State's evaluation process (A. 513-14), and the current planning handbook makes no mention of it (SX 4, § 10.31).

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[18] Not only did the handbook contain no such requirement, but in actual practice the State officials were as derelict as local administrators in assessing impact on segregation. *E.g.*, RX 90; 338 F. Supp., at 130, Pet. A. 295-96).

[19] *United States* v. *Board of Public Instruction of Polk County*, 395 F.2d 66 (5th Cir. 1968).

3. The Role of the State

Segregatory institutions and policies dating from the era prior to 1954 continued to be supported by State authorities long after this Court's decision in *Brown*. Black regional schools created and maintained with the assistance of the State Board of Education (PX 122, pp. 70a-71; 338 F. Supp., at 155-57, Pet. A. 352-56) remained in operation as late as 1968. No action was taken by State authorities either to desegregate or to close them (21 R. 132); indeed, the State Board approved expansion of one such facility in 1955 (PX 119, p. 44; PX 122; 338 F. Supp., at 157, Pet. A. 355). The State Education Department continued to hold its statewide conferences on a segregated basis until 1965 (PX 122, pp. 230, 237, 240, 251, 267, 280-81; A. 535). Prior to the passage of the Civil Rights Act of 1964, the State Board of Education (which had responded to *Brown* by officially opposing it and endorsing "massive resistance" devices under legislative consideration at the time (PX 119, pp. 42-43; 338 F. Supp., at 139, Pet. A. 316)), designated no Education Department staff personnel to work with local divisions to accomplish integration because, as an Assistant State Superintendent agreed, in the 1950's Virginia was not desegregating its schools (A. 679-80). And, as noted above, assessment of school construction proposals for their impact upon desegregation has *never* been made a part of the State's review procedures.

The State intervened directly to maintain segregation, however. Immediately after the *Brown* decision, the State Board and Superintendent directed local districts to operate as they had, until Virginia's school segregation laws were changed (PX 122, pp. 161-64; PX 119, pp. 42-43; RX 82, 83; A. 525-27, 533-35). They never were.

Instead, the 1956 Virginia Legislature enacted a series of measures designed to prevent school desegregation. It

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began with an interposition resolution[20] attempting to nullify *Brown*. It authorized the Governor to close any school which became integrated,[21] whether by local initiative or federal court order.[22] It withdrew pupil assignment power from the local school division Boards[23] and vested all authority over assignments in a newly created independent agency known as the State Pupil Placement Board[24] in order to preserve segregation[25] (PX 122, p. 171). The Board continued to function until 1968 (23 R.

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[20] Va. Acts 1956, S.J.R. 3, p. 1213, 1 Race Rel. L. Rep. 445.

[21] Va. Acts 1956, Ex. Sess., ch. 68, p. 69; 1 Race Rel. L. Rep. 1103. See PX 144-I; 338 F. Supp., at 243-44, Pet. A. 533-36.

[22] Exercising this authority in 1958, the Governor ordered the State Police to prevent the enrollment of seventeen Negro students in six formerly white Norfolk schools (PX 144, p. 122; 338 F. Supp., at 140, Pet. A. 318).

[23] A December 29, 1956 telegram from the Pupil Placement Board to then Chesterfield County Superintendent of Schools Fred D. Thompson began:

> Under the provisions of Chapter 70, Acts of Assembly, extra session of 1956, effective December 29, 1956, the power of enrollment or placement of pupils in all public schools of Virginia is vested in the Pupil Placement Board. The local school board, Division Superintendents, are divested of all such powers.

(A. 521-22; PX 122, p. 91).

[24] The State Department of Education undertook to publicize the regulations and procedures of the Pupil Placement Board (PX 122, p. 171; A. 522-24) and one of its employees also served the Placement Board on a part-time basis (A. 693).

[25] See PX 144-F; 338 F. Supp., at 138, Pet. A. 313-14 [letter from Attorney General]; *Adkins* v. *School Bd. of Newport News*, 148 F. Supp. 430 (E.D. Va.), *aff'd* 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957). Compare the Attorney General's reference to a "state-wide policy" with the following passage from the Brief for Appellees in No. 3, *Davis* v. *County School Bd.*, O.T. 1954, at p. 15:

> In general, education in Virginia has operated in the past pursuant to a single plan centrally controlled with regard to the segregation of the races.

58-59; 338 F. Supp., at 138, Pet. A. 313);[26] but, following invalidation of the Governor's school-closing powers by the Virginia courts in 1959,[27] the Legislature vested those same powers in the local school boards.[28]

The 1956 legislature also passed tuition grant legislation (338 F. Supp., at 141, Pet. A. 321). In 1958 the State Board of Education adopted regulations for the distribution of tuition grants, specifying their availability to pupils desiring to avoid attending desegregated public schools operated by the division of their residence (PX 122, pp. 181, 188; PX 119, p. 74; 338 F. Supp., at 141-42, Pet. A. 321-22). The program was expanded by enactment in 1960 of a pupil scholarship statute making grants available to attend nonpublic schools (PX 122, p. 210; 338 F. Supp., at 142-43, Pet. A. 323-25), and providing that the cost would be shared by the State and the local division. The act called for deduction of a local division's share of grants from State aid funds otherwise due it, if it refused to participate in the scholarship programs and thereby forced the State to make the full payment to individual parents (PX 122, pp. 213-17, 225-26).

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[26] In 1960 the General Assembly authorized local divisions to resume making pupil assignments in accordance with criteria to be promulgated by the State Board of Education. Va. Code Anno. §§ 22-232.18 to -.31. The following year, the State Board adopted regulations virtually identical to those of the Pupil Placement Board (PX 122, p. 218; A. 523-24).

[27] In *Harrison* v. *Day*, 200 Va. 439, 106 S.E.2d 636 (1959), the Supreme Court of Appeals of Virginia held the statute unconstitutional under the Virginia Constitution insofar as it authorized a State officer to discontinue local schooling over the objections of a division board.

[28] Va. Acts 1959, Ex. Sess., ch. 32, p. 110. The Virginia courts subsequently upheld the power of a division board to close all of its schools rather than desegregate them. *School Board of Prince Edward County* v. *Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963). *Compare James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *app. dism'd*, 359 U.S. 1006 (1959); *Griffin* v. *County School Board*, 377 U.S. 218 (1964).

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Meanwhile, the State made the services of its legal officers available to divisions resisting school desegregation efforts, and shared in the cost of retaining private counsel to fight desegregation suits. This financial support of segregation continued through the date of the District Court's decision below (PX 122, pp. 287-88, 304; PX 149, 149A, 149B, 149D, 149E; 338 F. Supp., at 155, Pet. A. 351). The State Department of Education circulated the anti-desegregation speeches of Virginia Governors (PX 122, p. 327; RX 83, pp. 38-41; 338 F. Supp., at 148, Pet. A. 336), but not information about the decisions of this Court which successively spelled out the scope of the constitutional duty to desegregate (A. 717-20; 338 F. Supp., at 155, Pet. A. 350). It supported continuing segregation in many ways: for example, by assisting Henrico to redraw segregated pupil transportation routes in 1957 (PX 120, pp. 102-38) and by making retroactive tuition grants to Prince Edward County whites in 1964 (PX 119, pp. 87-88; 338 F. Supp., at 143-44, Pet. A. 326).

Passage of the Civil Rights Act of 1964 and execution of a compliance agreement between the United States Department of Health, Education and Welfare and the State Department of Education brought little change. Not only did the State fail to take affirmative action to facilitate desegregation, but it threw roadblocks in the way of HEW enforcement.[29] The tuition grant and pupil scholarship programs continued (PX 112). No sanctions were brought to bear at the State level against divisions which refused

[29] In 1971 the State Board of Education still denied it had an affirmative duty to assist in the creation of unitary systems throughout the Commonwealth (A. 95, 113 [¶ 11]). *Compare* PX 96, Ex. A. 75, wherein the Assistant Attorney General of the United States expressed the view to State Superintendent Wilkerson that "the State Board of Education is the appropriate agency to be called upon to adjust the conditions of unlawful segregation and racial discrimination existing in the public school systems of Virginia . . . ."

to cooperate with HEW (A. 684-88, 700-01). The only official within the State Education Department with responsibility for desegregation efforts was critical of HEW (PX 136; 338 F. Supp., at 148, Pet. A. 336-37) and sought to have the Department make HEW's job as difficult as possible (PX 123; RX 87; PX 136A; A. 681-84; 338 F. Supp., at 152-53, Pet. A. 344-36). Despite the State's assurance in its agreement with HEW that it would secure and facilitate local school-division compliance with non-discrimination requirements (SX 7), it left matters entirely up to division officials (PX 144-G; 338 F. Supp., at 149, Pet. A. 337-38). And the State stood by while the ranks of black principals and teachers were decimated in the process of such desegregation as occurred at all (PX 139; A. 930-31; 338 F. Supp., at 155, Pet. A. 351-52).

4. Crossing Division Lines for Segregation

Of particular significance to this case are the many instances in which black and white students were assigned across school division lines to maintain school segregation. Three regional high schools for Negro students established with State approval and support [30] continued to operate a decade after *Brown* (PX 109; RX 86, Ex. A. 79).[31] Such

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[30] For example, in 1946 the State Board of Education contributed $75,000 toward the cost of building the Carver High School to serve Negro students from Orange, Madison, Greene, Rappahannock, and Culpeper Counties (RX 82, p. 2; 338 F. Supp., at 155-56, Pet. A. 352).

[31] Carver (see n. 30 supra), Manassas (serving Prince William, Fairfax, Fauquier Counties), Christiansburg Institute (serving Montgomery County, Pulaski County, and Radford City). A fourth regional high school, Jackson P. Burley (serving Charlottesville and Albemarle County) operated until the 1959-60 school year (A. 510, PX 109; RX 86, Ex. A. 79). Many other joint schools for black students were countenanced in Virginia, including those operated by the Lancaster and Northumberland County divisions, and the Rockbridge and Lexington divisions (see 338 F. Supp., at 155-57, Pet. A. 352-56). See A. 508-09.

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facilities were jointly administered by up to five school divisions, which sent all of their black students to the school. Often, travel distances were great:[32] in several instances, black students had to be housed in dormitories during the week to avoid inordinate daily transportation (PX 119, pp. 15, 19, 23; PX 122, pp. 70a-71; 338 F. Supp., at 157, Pet. A. 356). Where school divisions did not construct regional facilities, they often sent Negro pupils to classes in other districts by contractual agreement (PX 94, pp. 4, 7-8, 20, 30-31, 34-35, 39-41, 45, 49, 50, 57, 60; 338 F. Supp., at 159-61, Pet. A. 360-64).[33] This practice continued, in some instances, until 1969—and even involved the transportation of blacks to West Virginia or Tennessee districts to preserve segregation (*ibid.*)

Large numbers of individual student transfers across school division boundaries to attend segregated facilities resulted from the tuition grant and pupil scholarship programs (see p. 20 *supra*).[34] For example, within a few months after the Norfolk schools were closed,[35] nearly 6,500 grant applications had been approved to permit Norfolk students to attend South Norfolk and other school systems (PX 119, pp. 60-65; 338 F. Supp., at 142, Pet A. 323). The funds were used to permit students to attend out-of-State schools as well (PX 110, 111). From 1954 to

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[32] The Carver High School, for example, served five counties and a total area of 1338 square miles. See A. 508-10.

[33] The district court's opinion details numerous examples from the exhibits in the case at 338 F. Supp. 159-61, Pet. A. 360-64.

[34] The 1960 statute contained a declaration of legislative purpose stating that

> it is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in non-sectarian private schools in or outside, and in public schools located outside, the locality where the children reside. (A. 938).

[35] See note 22 *supra* and accompanying text.

1971, almost $25 million in State and local funds were expended under the grant and scholarship programs (PX 112; 338 F. Supp., at 145, Pet A. 329); substantial amounts were paid to Richmond, Henrico and Chesterfield students (PX 101, 112, 117, 118, 120; 338 F. Supp., at 145, Pet A. 329-30).

Pupils have crossed lines to attend segregated schools through a variety of other means. For example, as previously noted,[36] a black Richmond high school is located within Henrico County, and a black elementary school partly within the county. As the result of annexations, numbers of students have temporarily attended classes in school divisions in which they did not reside, on a segregated basis. The 1970 annexation decree, for example, provided that some Chesterfield residents would attend schools now located within the Richmond system during a transitional period. As long as those schools remained identifiably white, no difficulty ensued; but after Richmond implemented its interim plan of desegregation[37] for the 1970-71 school year, the County Superintendent publicly invited county residents attending Richmond schools to return and enroll in county schools (A. 485-90).

B. *The Metropolitan Context*

We have several times spoken in this Brief of the "greater Richmond area." We now summarize the evidence which supports that characterization and describes the two principal relevant features of the Richmond-Chesterfield-Henrico complex: (1) intense and increasing cohesion as a single, functioning economic and social community, marked, however, by (2) intense and increasing differentials in racial concentration as between the City and its two surrounding counties.

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[36] See note 7 *supra.*

[37] See note 4 *supra;* pp. 36-37 *infra.*

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1. Unity of the Metropolitan Area

The City of Richmond, encompassing approximately sixty-three square miles, lies nearly at the geographic center of the area made up by the Counties of Henrico (244 square miles) and Chesterfield (445 square miles), which surround the City on all sides. Other counties to the north and south of Henrico and Chesterfield, respectively, are separated from this greater Richmond region in whole or in part by the Appomattox and Chickahominy Rivers (see maps at Ex. A. 27-31).[38] Virtually all of Henrico and most of Chesterfield County[39] lie within thirty minutes' travel of Capitol Square in Richmond, using regular streets and averaging twenty to forty miles per hour (A. 154-56; RX 60, Ex. A. 13; HX 36-A).

The two counties and Richmond are highly interrelated and mutually dependent. As is typical of most urban areas,[40] the central core city has ceased to register increases in population in the decennial censuses; the major population growth from 1950 to 1960 occurred in Henrico County, and in 1960 to 1970 in Chesterfield County (A. 156-57; PX 17, Plates 8, 10-11, 15; RX 46; CX 21; HX 24). The most densely populated areas of each county are contiguous to Richmond (PX 17, Plates 17-24; HX 38, 38-A; see also,

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[38] The entire area was originally a part of Henrico (A. 798); Richmond and Chesterfield County, among other political entities, were created from it. Subsequently, the city annexed various portions of each county (HX 5; CX 2).

[39] This includes all of the areas which, under the plan approved by the district court (see pp. 46-49 *infra*), would send any students to a school or schools presently located within the boundaries of the City of Richmond (see A. 236; RX 95). Although parts of Chesterfield County are also within thirty minutes' travel time of other Virginia municipalities (CX 20), there was no showing of the same degree of mutual interdependence that exists between the county and Richmond.

[40] See discussion at pp. 55-60 of the Petition for Writ of Certiorari in this matter.

PX 17, Plates 42-44). The 1970 Census reveals a total population of 480,840: 249,430 in Richmond, 154,364 in Henrico and 77,046 in Chesterfield.[41]

A variety of historical, economic and social indicators demonstrates the close functional unity of the region despite its division into three independent political entities. For example, evidence introduced at the trial indicates that prior to the 1970 annexation,[42] over three-quarters of the jobs in the region (78% of those covered by Virginia's unemployment compensation program) were in Richmond (RX 55, Ex. A. 3) and that half or more of the residents of each county worked in Richmond (A. 160-61).[43] 1970 Census data[44] confirms the continuation of these patterns.[45]

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[41] See table at p. 30 *infra*.

[42] Effective January 1, 1970, Richmond annexed an area of Chesterfield County containing 47,262 persons, 97% white. See *Holt* v. *City of Richmond*, 459 F.2d 1093 (4th Cir. 1972).

[43] The evidence introduced below was prepared in connection with annexation proceedings against Henrico and Chesterfield Counties in 1964 and 1969, respectively, and showed that in 1962, 66% of Henrico residents, and in 1968, 48% of Chesterfield residents were employed in Richmond (RX 56, 56A, Ex. A. 5-6). It was also shown that 90% of all attorneys listed in the 1970 "Greater Richmond Telephone Directory" had their offices within the city, and of those, 51.4% lived in Richmond, 42% in either of the two counties, and 6.6% elsewhere (A. 161); and that approximately one-third of the State Education Department employees in 1971 lived in each of the three political entities *(ibid.)*.

[44] Statistics compiled from the 1970 United States Census were not available to the parties or the district court at the time of trial (see A. 160). Throughout this Brief, we shall refer to the latest figures available from judicially noticeable sources because they update those available at the time of trial and have the added virtue that they were compiled following the 1970 annexation of a portion of Chesterfield County by the City of Richmond (note 42, *supra;* see 338 F. Supp., at 180-82, Pet. A. 406-10).

[45] According to the 1970 Census, 48% of Chesterfield workers are employed in Richmond, 30% in Chesterfield and 6% in Henrico; 65% of Henrico residents work in Richmond, 27% in Henrico and

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Similarly, pre-annexation Richmond accounted for 62% of the region's retail sales (A. 163; RX 54, 54A, Ex. A. 1-2) and later figures demonstrate its continued preponderance as the commercial and mercantile center of the area.[46]

The daily newspapers of general circulation throughout the area are in Richmond (A. 775-76),[47] as are most local television and radio stations and a disproportionate number of public and private educational and cultural facilities:

3% in Chesterfield. UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS TRACTS, CENSUS OF POPULATION AND HOUSING, *Richmond, Va.* SMSA (G.P.O. PHC(1)-173, 1972), p. 11, Table P-2, Social Characteristics of the Population: 1970. (These figures omit workers whose place of work is unreported). Analyses performed for a Richmond Regional Transportation Study projected that the City would retain a similar proportion of metropolitan employment in the future (A. 160, 163; RX 54, 55, Ex. A. 1-4).

[46] Richmond is responsible for $698,123,000 (72%) in retail trade as compared to $89,226,000 in Chesterfield and $186,021,000 in Henrico. Richmond's preponderance is still greater in regard to "shopping goods"—those purchased from department and apparel stores and thus comprising routine consumer items. Richmond accounts for $213,671,000 of such purchases, five times the amount of Henrico's $39,253,000 and almost seventeen times Chesterfield's $12,704,000. RAND, MCNALLY & CO., [1972] COMMERCIAL ATLAS & MARKETING GUIDE 76. Compare 338 F. Supp., at 178, 182, Pet. A. 402, 411.

[47] Newspapers are a good index of the independent identity of subparts of a region, because they are relatively inexpensive to establish (less expensive, for example, than television stations—all six of which in the Richmond SMSA are located in Richmond City), and are directly responsive to the demand of the local populace for news about their neighbors, about local political issues, and about the doings in the community as that is perceived by its inhabitants. Henrico County apparently has no newspapers; Chesterfield has only one: a weekly published in Chester, which is a town of about 5,500 residents. The Richmond newspapers therefore serve the counties. There are an estimated 83,100 households in Richmond City, and 74,200 in the counties, *op. cit. supra*, at 76 n. 77; Richmond's morning *Times-Dispatch* has a daily circulation of 140,618 and a Sunday circulation of 193,540. Richmond's evening *News-Leader* a circulation of 118,410. [1972] AYER DIRECTORY OF PUBLICATIONS 1084, 1122.

for example, six of seven institutions of higher learning, including a medical college (A. 164), and the major libraries and museums of the area (A. 164; RX 59, Ex. A. 9-11). Health services for the entire area are concentrated in Richmond (which includes within its boundaries 17 of the community's 18 hospitals (A. 165)); most residents of the region are born in and die within Richmond.[48] Such public transportation as is available in each of the counties is almost exclusively directed toward travel between suburb and city rather than within each county (see A. 885-86).

While the subdivision of the region among three political units naturally creates a competitive spirit in various affairs, there has been a great deal of concerted action for mutual benefit. Henrico County offices are located in Richmond, and its employees there depend upon the City's police and fire services (A. 805-06). Parts of the county's territory have in the past received fire protection from Richmond pursuant to agreement, and there is presently a reciprocal fire assistance pact between Richmond and Chesterfield County (A. 877; 338 F. Supp., at 184, Pet. A. 415). The City has entered into 20-year sewage treatment and water supply contracts with Henrico County, which receives 90% of its water from Richmond, as well as reciprocal supply agreements for these utilities with Chesterfield County (A. 188-94; RX 48-51). Pursuant to statute, the city and counties share concurrent regulatory jurisdiction over subdivision development in an area five miles around Richmond (A. 166; PX 121, p. 232; 338 F. Supp., at 229, Pet. A. 517).

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[48] Data compiled by the Richmond Planning Department from Bureau of Vital Statistics records showed that 70% of resident Chesterfield mothers, 79% of Henrico mothers and 94% of Richmond mothers gave birth within the City, while 49% of Chesterfield residents, 55% of Henrico residents and 85% of all Richmond residents died in the City (A. 165; RX 61, 61A, Ex. A. 15-16).

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The three school systems have likewise acted together. A modern vocational-technical training facility is operated by the Richmond system, enrolling a proportionate number of students from the three subdivisions. Together, several specialized joint schools are operated: two centers for mentally retarded children (one located in Henrico and another in that area of Chesterfield County annexed to Richmond in 1970), and a mathematics-science center in Henrico (A. 417-20).

Together with Hanover County, the three jurisdictions compose the Richmond Standard Metropolitan Statistical Area as designated by the U.S. Census Bureau.[49] Every report of local or regional planning bodies and privately retained consulting firms has noted the marked interdependence of the city and counties (PX 148; RX 47, 89, Ex. A. 34, 36); the district court reviews these and much of the evidence introduced at the trial in its detailed findings (338 F. Supp., at 178-84, Pet. A. 401-16).[50]

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[49] The Bureau's criteria are set forth in UNITED STATES BUREAU OF THE BUDGET, OFFICE OF STATISTICAL STANDARDS, STANDARD METROPOLITAN STATISTICAL AREAS (1967). Generally, an SMSA is defined to include counties containing at least one city of 50,000 or more inhabitants, together with those adjacent counties that are metropolitan in character and are integrated economically and socially with the county of the central city. Although Hanover County, which contains only 7% of the SMSA's population, was added to the Richmond SMSA by the Census Bureau in 1963, consultants' reports have noted the considerably lesser degree of interdependence between Hanover and Richmond (HX 25, Ex. A. 41). The Hanover schools enroll only 9,600 students, 78% white, and were desegregated in 1969.

[50] See the comment of the Henrico County Circuit Court in a 1964 decision in a Richmond annexation suit (HX 7, Ex. A. 53):

> Although community of interests is not necessarily as vital a consideration as other factors to be considered . . . this Court nevertheless feels that this factor should be given consideration. . . . Dependence of the central city of Richmond and the immediately surrounding county is mutual. [record citations omitted] The evidence shows that the commercial and civic interests of the city and county are largely identical.

2. Demographic Trends

A dominant characteristic of the metropolitan area is the increasing concentration of blacks in the Richmond central city, and whites in the suburban counties. (See RX 57, 57A, Ex. A. 7, 8; RX 71 [total population]; RX 62, 75-78, Ex. A. 21-26 [school population]; PX 17, Plate 25). Census reports for the past twenty years are revealing:

TABLE 3

POPULATION WITHIN THE RICHMOND SMSA[51]

	1950 population	1950 % nonwhite	1960 population	1960 % nonwhite	1970 population	1970 % nonwhite
Richmond	230,310	31.7	219,958	42.0	249,430[52]	42.4[52]
Chesterfield	40,400	20.9	71,197	13.3	77,046[52]	11.5[52]
Henrico	57,340	9.9	117,339	5.2	154,364	6.8

This realignment of the region's racial demography coincides with the suburbanization of Richmond—a dramatic shift in population growth patterns.[53] Prior to 1940 most of the population increase in the region occurred in Richmond (A. 156), but since that time more than 90% of the growth has taken place in Henrico and Chesterfield counties. Henrico made its greatest gains from 1950 to

[51] Sources: UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, II CENSUS OF POPULATION: 1950 (G.P.O. 1952), 46-29, 46-30; UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, I CENSUS OF POPULATION: 1960 (G.P.O. 1961), 48-28; UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970 (G.P.O. PC(1)-B48, Oct. 1971), 48-42 (correction page), 48-44.

[52] The Richmond and Chesterfield figures for 1970 are affected by the 1970 annexation described in note 42, *supra*. Without that annexation, the differential population growth and racial change trends shown by the table would be even more marked.

[53] The Executive Director of the Richmond Regional Planning District Commission testified, in fact, that for a century prior to 1950, Richmond's nonwhite population had been declining (21 R. 10-11).

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1960, and Chesterfield in the 1960-70 decade (*compare* PX 17, Plates 8, 10, 11; CX 21; HX 24 [lots and subdivisions developed]), while Richmond lost population.

The overall racial composition of the area has remained remarkably stable throughout its recent development: in 1940 blacks accounted for 28% of the population; in 1970, 26% (RX 71). But the distribution of whites and blacks throughout the area has shifted markedly, as noted above. Despite the annexation of a predominantly white portion of Chesterfield County in 1970,[54] Richmond showed an increased proportion of blacks in its total population and reached a new high of 42.4%; while black population in Chesterfield and Henrico fell off to 11.5% and 6.8% black, respectively.[55] Richmond accounted for only 25% of the white population gain in the SMSA during the 1960-70 decade, whereas Henrico and Chesterfield Counties received 60%[56] of that increase. On the other hand, Richmond received 75% of the increase in black population within the SMSA during the decade.

The population changes are, of course, reflected in the changing enrollments of the region's schools. Enrollment in the Richmond system grew from 38,857 in 1954-55 to 47,604 in 1970-71 (including the pupils gained by the 1970 annexation from Chesterfield County), while Henrico went from 13,142 to 34,470, and Chesterfield went from 9,132 to

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[54] The annexation added some 47,000 residents to the city; without it, instead of gaining nearly 30,000 people from 1960 to 1970, Richmond would have lost over 17,000. See UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970 (G.P.O. PCH(2)-48, 1971), at p. 5.

[55] In the preceding decade (1950-60), Richmond lost total population but changed from 32% black to 42% black. Henrico more than doubled in size but dropped from 10% to 5% black, and Chesterfield grew by 75% but dropped from 21% black to 13% black. See Table 3 *supra*.

[56] Richmond contains 48% of the total population in the SMSA.

24,063 (the latter figure reflecting, once again, the pupils lost by the 1970 annexation). Although at the time of *Brown*, Richmond's student population was 43.5% black and the counties' 20.4% and 10.4% black, respectively, by 1971-72 each county enrolled less than 10% black students and the Richmond system had become over 69% black (RX 75-78, Ex. A. 21-26).

Both total population distribution and school system enrollments from 1950 to 1970 reflected increasing racial concentration and segregation, according to Dr. Karl Taeuber, an expert witness and noted demographer (PX 131, A. 628-32). These trends have been apparent to local agencies and consultants for some time. A 1964 report of the Richmond Regional Planning Commission predicted an increasing black population in the City and noted that the increasing non-white school population was a factor contributing to the decline in white city residents (24 R. 81, 84-85). An earlier consultant's study (RX 89, Ex. A. 34) stressed that white migration from the city was resulting in the rapid changeover to a majority-black school system. And in 1967, private consultants retained by the Boards of Supervisors of Henrico and Chesterfield Counties made these observations (HX 25, Ex. A. 41):

> . . . there is every reason to believe that life in the Richmond metropolitan area is becoming *more* segregated with time, rather than less segregated. By that we mean non-white populations are continuing to be concentrated in the City of Richmond, and the small non-white percentages in Henrico and Chesterfield counties are likely to become even smaller with time as the white population in these counties continues to expand. At the present time there is little reason to believe that the State of Virginia or the U.S. Government is likely to adopt legislation, such as a "fair housing act," which would significantly alter this pat-

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tern of concentrating Negro housing in central cities and white housing in suburbs.[57]

It is not surprising, therefore, to find that racially discriminatory housing practices pervade the area (338 F. Supp., at 84, Pet. A. 195-96; 462 F.2d, at 1065-66, Pet. A. 572-74).[58] In its earlier ruling involving the City of Rich-

[57] It is obvious from the statistics that the 1968 Fair Housing Act, passed by the Congress, has not "significantly alter[ed] the pattern." Martin Sloane, an expert on race and housing (A. 727-35) testified that such measures would take generations to reverse the effects of past discrimination (A. 753).

[58] The Court of Appeals misconceived the significance of the evidence relating to housing segregation in several respects. For one thing, while it accepted the lower court's findings that past state and federal governmental action had limited the areas in which blacks could buy housing (462 F.2d, at 1065, Pet. A. 572), it failed to consider whether school district lines which incorporated that segregation into the school system were not therefore impermissible obstructions of the affirmative duty to desegregate identifiably black schools. *Compare Brewer* v. *School Bd. of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968) (attendance zones incorporating housing discrimination) *with* 462 F.2d at 1066, Pet. A. 574 (housing discrimination apparently irrelevant in the present case).

Second, the Court of Appeals appears to have dismissed the significance of discrimination against blacks in the field of housing because it existed in Richmond as well as the two counties (462 F.2d at 1066, Pet. A. 574). There are still areas of Richmond to which blacks cannot move (21 R. 32). But the suburban county areas in which population growth has taken place in the last twenty years have been all but totally closed to blacks while the established ghetto areas in the city have expanded, in typical fashion, on their periphery (A. 666).

Finally, the Court of Appeals thought housing segregation irrelevant because *it* could not perceive that blacks had been attracted to Richmond from the counties or that all the whites who left Richmond settled in the counties (462 F.2d at 1066, Pet. A. 574). Not only is the Court's examination of school attendance changes for a single year (*ibid.*) an exceedingly imperfect indicator of population trends, but racial disproportions also result from the tendency of new arrivals to an area to settle in accordance with perceived customs in the community, i.e., to conform to established or developing patterns of racial segregation (A. 666). *Compare* HX 25, Ex. A. 41.

mond alone (317 F. Supp., at 561-63, Pet. A. 8-12), the district court found extensive discrimination, both public and private, affecting the availability of housing to black families, including widespread use of racial covenants, deliberate location of segregated housing projects in segregated areas, encouragement of racial discrimination by brokers and sellers through policies of federal (FHA, VA, etc.) and private lending or mortgage insuring institutions, and long-continued newspaper advertisement identification (direct or indirect) of properties as intended for purchase by buyers of a particular race. The evidence received in the present proceedings establishes that these and other discriminatory practices exist throughout the metropolitan area (338 F. Supp., at 212-29, Pet. A. 478-519).

Only a brief canvass is feasible here: The Acting Deputy Staff Director of the United States Civil Rights Commission described in detail how early FHA approval of racially restrictive covenants established racial segregation as the normal practice of the building industry (A. 737-39; see PX 127-30A, 137), whose effects continue even today. Prior to 1950, most subdivisions developed in either Richmond or the counties contained the covenants (A. 80-86, 1335), and a significant number platted thereafter also employed the covenants (PX 127; CX 37, 38). An FHA official reported that covenants were used on many county subdivisions constructed with FHA assistance (A. 595-98). The location of black housing projects in segregated areas of Richmond (PX 39, 121, p. 242, 130) was confirmed by the Director of the Housing and Redevelopment Authority, who said that his inability to locate public housing outside the City[59] reinforced the overall segregated residential patterns (A. 617). There were continued racially separate property listings in the newspapers of general circulation

[59] *Compare* A. 468-80.

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throughout the area until 1968 (A. 769-70, 777; PX 42), and the area's leading title company continued until 1969 to include restrictive covenants in its title reports (20 R. 4-17; PX 90). Incidents suggesting discriminatory treatment of black prospective buyers of county properties were unrebutted and unchallenged on cross-examination (A. 461-67; 21 R. 42-49; see also, PX 92; 19 R. 214-18), and the existence of a pattern of discriminatory practices was confirmed by both reports of an official agency (PX 148, p. 34) and the testimony of its Executive Director (A. 497-98, 500-01). To the extent that the segregated patterns might be viewed as the result of economic, not racial factors (*but see* A. 632, 636-38), evidence demonstrating the substantially lower socioeconomic status of blacks in Virginia after decades of inferior, segregated education was introduced (PX 125).

II. The Proceedings Below

A. *Litigation from 1961 to 1970*

The present case began in 1961 as a class action to desegregate the Richmond schools (A. 1). The School Board of the City of Richmond and the Pupil Placement Board of the Commonwealth of Virginia were initially made defendants (A. 59-69). The district court ordered that individual named plaintiffs be admitted to the white schools to which they desired to transfer but denied an injunction in favor of the class. The Court of Appeals reversed in part, directing limited class relief. 317 F.2d 429 (4th Cir. 1963).

After further proceedings in the district court, the Court of Appeals rejected plaintiffs' challenge to free-transfer desegregation plans and held also that faculty desegregation would not be required. 345 F.2d 310 (4th Cir. 1965).

This Court granted certiorari on the latter holding only, reversed, and directed that faculty desegregation be commenced. 382 U.S. 103 (1965).[40]

On remand from this Court, a consent decree was entered which embodied a freedom-of-choice plan, provided for faculty desegregation, and obligated school authorities to replace free choice if it failed to produce results. However, despite continuation of the patterns of segregation (see 338 F. Supp., at 71-72, Pet. A. 167-69), Richmond school officials took no action. March 10, 1970, the plaintiffs filed a motion for further relief, relying upon *Green* v. *County School Board*, 391 U.S. 430 (1968) (A. 8).

B. *Proceedings on the Motions for Further Relief and to Add Parties*

The motion for further relief elicited an admission by the Richmond School Board that its free-choice plan did not meet then current constitutional standards (338 F. Supp., at 70-71, Pet. A. 165). The district court directed submission of new plans for desegregation of the Richmond schools. Initially the Richmond School Board submitted a plan, prepared with the assistance of HEW, based upon neighborhood zoning without pupil transportation (338 F. Supp., at 71, 74-76, Pet. A. 166-67, 173-77). The plaintiffs, through an educational expert, submitted an alternative plan using all of the techniques subsequently validated by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), as applied to the schools within the City of Richmond (317 F. Supp., at 568-72, Pet. A. 24-32). June 26, 1970, at the conclusion of an evidentiary hearing, the district court rejected the HEW

[40] In its 1965 opinion, this Court noted the passage of a decade since *Brown* and announced that delays in desegregation could no longer be tolerated. 385 U.S., at 105.

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plan and afforded the Richmond School Board an additional opportunity to submit its own alternative plan (338 F. Supp., at 78, Pet. A. 182). The board thereafter proposed a plan which adopted pupil transportation at the secondary levels but avoided it at the elementary levels, and which did not achieve as much desegregation as the plaintiffs' plan.

Following a hearing in August, 1970, the district court permitted the school board to implement its second plan on an interim basis for the 1970-71 school year, for the explicit reason that sufficient time was no longer available within which to acquire the transportation capacity necessary to implement a plan like that submitted by the plaintiffs, which the district court expressly approved as "reasonable" within the meaning of the then applicable law [*Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138 (4th Cir. 1970)] [*rev'd* 402 U.S. 1 (1971).] (317 F. Supp., at 572, Pet. A. 32). The district court's opinion and order instructed the Richmond School Board that a plan which achieved as much or more desegregation than that submitted by the plaintiffs would have to be implemented not later than the 1971-72 school year, and again afforded the board an opportunity to submit such a plan drawn by its officials.

> . . . The Richmond public schools cannot be desegregated without using the techniques used by Dr. Foster such as non-contiguous zoning, pairing, clustering of schools and transportation, . . . (317 F. Supp., at 575, Pet. A. 40).

The school board was directed to notify the district court within 90 days of the steps it had taken to implement a constitutional plan and of the earliest date such a plan could be put into operation in the Richmond public schools (317 F. Supp., at 578-79, Pet. A. 47).

On November 4, 1970, the School Board of the City of Richmond filed a motion to join the School Boards and Boards of Supervisors of Henrico and Chesterfield Counties, their school superintendents, the State Board of Education, and the State Superintendent of Public Instruction as additional parties, on the ground that full and effective relief could not be granted to the plaintiffs[61] without the joinder of these parties (Fed. Rule Civ. Pro. 19).[62] The

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[61] During the previous summer's hearings, Dr. Thomas Little, Associate Superintendent of the Richmond system, had been asked on cross examination whether Richmond schools could be desegregated without using pupil transportation. After his negative response, the following exchange took place:

> Q. Dr. Little, assuming transportation of pupils, is there any way to achieve what you consider to be, as an educator, an optimum of desegregation in the Richmond area? A. In the Richmond area, yes.
>
> Q. How would you do that? A. It would involve the involvement of a larger area than the present city boundaries of the City of Richmond.
>
> Q. Are you talking about Henrico County, Chesterfield County, or both? A. Henrico County, Chesterfield County, and the possibility of the general metropolitan area, maybe bordering on, in other counties other than Henrico and Chesterfield. Basically, the problem could be solved within the City of Richmond, Henrico and Chesterfield Counties. [6/25/70 Tr. 1122-23].

[62] On November 15, 1970, counsel for the Richmond Board informed the district court by letter that new plans would not be filed until January, 1971. On December 9, 1970, plaintiffs accordingly filed a motion which sought implementation of their alternative plan effective with the second semester of the 1970-71 school year, which they contended was required under *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970). The district court also had before it a motion of the School Board seeking to vacate a *pendente lite* construction injunction, see, *e.g.*, *Calhoun* v. *Cook*, 430 F.2d 1174 (5th Cir. 1970), which it had issued following the first hearings on the motion for further relief. In an opinion entered January 29, 1971 and reported at 324 F. Supp. 456, the court denied the motion to implement

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district court invited counsel for the parties sought to be joined by the motion to appear and present argument concerning the sufficiency and propriety of the motion (36 R.) After the submission of memoranda, the district judge

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plaintiffs' plan and vacated its injunction as to those proposed construction projects to which plaintiffs had no objection.

On January 15, 1971, the School Board of Richmond filed three alternative desegregation plans limited to the Richmond schools. Following an evidentiary hearing on March 4, 1971 (to which counsel for the added defendants were invited to express any views concerning the appropriate relief required within the City of Richmond should the claim against them be held insufficient [see 34 R., 2/16/71 Tr. 5-6]), the district court approved one of the plans proposed by the school board and directed its implementation commencing with the 1971-72 school year. In doing so, the court expressly qualified its conclusion that the school board's plan met the requirements of the law by the reservation that all questions of additional relief against the joined parties remained to be litigated:

> The record will disclose that there is now pending before the Court in this school desegregation case a yet to be determined issue concerning the duty or duties, if any, imposed by law upon certain defendants joined by leave of Court granted Dec. 5, 1970. The conclusions contained in this memorandum are accordingly predicated solely on the state of the record insofar as same applies to the present duty of those defendants who were parties to the suit prior to the joinder motion; without consideration of the issues involving the joined defendants. Trial of those issues, depending on the evidence and the law, may or may not disclose further obligations on all parties.

325 F. Supp., at 830 n. 1, Pet. A. 110. In its opinion of April 5, 1971, the court approved the Richmond School Board's plan for 1971-72 because:

> . . . the School Board, if this proposal succeeds as planned, will have eliminated the racial identifiability of each facility *to the extent feasible within the City of Richmond.* This is the extent, under current law, of the affirmative obligation governing use of *its* available powers. . . . (325 F. Supp., at 835, Pet. A. 121 [emphasis supplied].)

The court noted in a footnote that: "This conclusion is based upon what can be reasonably expected within the geographical boundaries from which the students for whom the School Board now has responsibility come."

found, without intimating any view on the merits of whatever underlying claims might be made, that it was appropriate to grant the motion in order to litigate the duty, if any, owed by the additional defendants to the plaintiffs or the Richmond School Board. The court noted that its finding with respect to a desegregation plan for the City of Richmond was

> . . . made in the context of litigation between Richmond residents and Richmond officials alone. It is by no means inconsistent with the existence of a duty on the part of officials with broader powers to exercise such powers to afford different or additional relief from what the Court has found to be state-imposed segregation. The addition of further parties, moreover, alters the range of alternatives, some of which may be shown as feasible and more promising in their effectiveness. Green v. County School Bd. of New Kent County. [citations omitted]. It is with an eye to this range of choices between means to provide desegregated schools that the legal sufficiency of a proposed unitary plan is to be tested.

(51 F.R.D., at 141, Pet. A. 50-51).

At the same time, the district court set forth its view of the issues which would be presented by claims against the additional defendants, in terms to which the court consistently adhered during subsequent proceedings:

> Certain of the additional parties have a direct affirmative obligation toward the Bradley plaintiffs, and others of them might well be necessary in order that the first can fulfill that obligation; the question remains whether in fact that obligation has been fulfilled. On that point the position of the instant plaintiffs is not clear. They demand a unitary school system.

> However, whether it is their contention that this may or must be achieved by the formation of a consolidated school division or by other means beyond the power of the present defendants does not appear with clarity from the pleadings. The measure of the effort which may be required of those sought to be joined may depend upon both the extent to which the actions, if any, of these persons or their predecessors have contributed to the existing situation, and also the reasonableness of the remedial steps which are available.

(*Id.* at 143, Pet. A. 54-55). Accordingly, and since counsel had expressed their intention to do so at the hearing (36 R. 8), plaintiffs were directed to file an amended complaint "wherein they set forth both those alleged facts which they contend give rise to an obligation on the part of those joined to take steps to achieve a unitary school system for the class they represent, and also the particular relief demanded." (*Id.* at 143-44, Pet. A. 55).

Plaintiffs' amended complaint (A. 99-109), filed December 14, 1970, alleged constitutional violations on the part of all added defendants and concluded with a prayer seeking the assignment of students across the school division lines between Richmond, Henrico and Chesterfield to achieve desegregation, either by "the consolidation or merger of the defendant school systems in all aspects of school operation and administration . . ." or by "such agreements, contracts, or otherwise [as would] provide for the joint operation of the educational systems of the City of Richmond and the Counties of Henrico and Chesterfield, with free availability of all facilities for pupil attendance and tri-system-wide assignment of pupils, teachers, school plant, transportation facilities and all other incidents of school operation, to the end that no school within

the respective defendant school systems shall be racially identifiable" (A. 107-08).[63] (See also, A. 1336-43.)

Following disposition of a series of pre-trial motions by the State and County defendants,[64] and pretrial conferences during the Spring of 1971, evidence was received August 16-20, 23-27, 31 and September 1-2, 7-10, and 13, 1971.

C. *The Findings and Order of the District Court*

On January 5, 1972, the district court issued its Memorandum, containing a short history of the case (338 F. Supp., at 70-79, Pet. A. 164-85); general factual findings and conclusions, together with a discussion of applicable legal principles (338 F. Supp., at 79-116, Pet. A. 185-263); and extensive, detailed, specific findings of fact supportive

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[63] The Amended Complaint also requested that defendants be required

> to prepare and submit for approval of the Court a plan for the operation of all of the public schools within the defendant school systems in conformity with the requirements of the Fourteenth Amendment, including but not limited to, the establishment of schools, pupil populations, staffs, faculties, transportation routes and extracurricular activities which are not racially identifiable and to be effective with the commencement of the 1971-1972 school year.

(A. 108).

[64] On January 8, 1971, the district court denied a motion to recuse which had been made by several of the added defendants (324 F. Supp., at 439, Pet. A. 58-90). On February 10, 1971, the court denied a motion to dismiss as to certain of the added defendants in their individual capacities (324 F. Supp., at 401, Pet. A. 107-09) and on the same date denied the motion of several of the joined parties to convene a three-judge court pursuant to 28 U.S.C. §2281 to hear and determine the cause (324 F. Supp., at 396, Pet. A. 98-106). Additional pre-trial motions were disposed of in two unreported orders (Pet. A. 91-97). A renewed motion to convene a three-judge court, made following a 1971 amendment of Virginia's Education Code (see Appendix E *infra*), was also denied (Pet. A. 156).

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of the general findings and conclusions (338 F. Supp., at 116-230, Pet. A. 185-545).

The district court found that, notwithstanding the implementation of a court-ordered plan in Richmond and the taking of various steps toward desegregation in the counties, the schools remained racially identifiable. They were, in other words, "black" schools and "white" schools, whether viewed in terms of the common sense perceptions of students and parents based upon marked deviations from the community-wide ratio, or of the informed judgment of professional educators, or of the history of discrimination and segregation in Virginia. (338 F. Supp., at 80-81, Pet. A. 186-90.) The court concluded that unconstitutional dual school systems in the Richmond area had not been eliminated:

> A brief examination of the current data and that of recent years showing pupil assignment patterns in schools of the three political subdivisions of Richmond, Henrico and Chesterfield, shows both great disparities in 1971 racial composition, making both individual facilities and entire systems racially identifiable and also a very recent history of the maintenance of a great number of one-race schools. Some such still exist. The recent statistical history of these school divisions is set forth in accompanying tables. Appendix "A". [338 F. Supp., at 80, Pet. A. 186]
>
> . . .
>
> The institution within the three existing school districts of something which might in some other context pass for desegregation of schools is a phenomenon dating at best from the opening of the 1971-72 school year, which took place during the trial of this case. Prior thereto each system was in some respect nonunitary, and the Court is not fully advised as to the

> current status of the county system[s]. Even were each existing system, considered in a vacuum, as it were, to be legally now unitary within itself, the question still remains whether a state policy having the effect of preventing further desegregation and foreseeably frustrating that which has been accomplished to date may be imposed upon a very recently achieved desegregated situation. Momentary unitary status—assuming it existed here, which has not been shown—will not insulate a school division from judicial supervision to prevent the frustration of the accomplishment. (338 F. Supp., at 104, Pet. A. 238.)

The persisting dual school systems, the court found, could no longer be remedied by piecemeal desegregation plans limited to the individual divisions of the metropolitan area (338 F. Supp., at 90-91, 103-04, Pet. A. 207-11, 236-39):

> The maintenance of segregation in an expanding community therefore creates problems, when a remedy must eventually be found, of a greater magnitude in the present than existed at an earlier date. . . . (338 F. Supp., at 91, Pet. A. 210.)

Believing that practical needs compelled consideration of the three school divisions together in developing an effective plan of desegregation, the district court inquired whether any legitimate State interest in maintaining the existing school division boundary lines would prevent the combination of city and county schools in a desegregation plan that could achieve the greatest possible degree of actual desegregation and thereby eliminate racially identifiable schools or systems (338 F. Supp., at 81-83, Pet. A. 190-93).

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The court answered this question in the negative, in light of:

(1) the history of willingness by Virginia school authorities to cross school division lines freely in order to promote and serve segregation (338 F. Supp., at 83-84, Pet. A. 193-95; see pp. 34-37, *supra*);

(2) the coincidence of the Richmond City boundary lines with highly segregated residential patterns which were shown to have resulted in part from racially discriminatory practices by private individuals and public agencies, including the school construction practices of the separate systems (338 F. Supp., at 84-89, 91-92, Pet. A. 195-207, 211; see pp. 16-17, 33-35, *supra*);

(3) the lack of coincidence of the boundary lines with any "tangible obstacles" and their lack of relation "to any administrative or educational needs" (338 F. Supp., at 83, Pet. A. 192-93);

(4) the shared control of public education—utilized in the past to avoid and resist desegregation—between local and State authorities (338 F. Supp., at 92-96, 98-103, Pet. A. 212-21, 227-36; see Appendices C, E *infra*).

The district court therefore found it appropriate to require state and local authorities to act in concert to facilitate the execution of a desegregation plan that would cross existing school division lines in order to provide effective constitutional desegregation[65] of the Richmond area schools (338 F. Supp., at 96-98, 104-13, Pet. A. 222-26, 239-59):

The Court concludes, in the context here presented, that the duty to take whatever steps are necessary to

[65] See Appendix A *infra*.

> achieve the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools is not circumscribed by school division boundaries created and maintained by the cooperative efforts of local and central State officials. (338 F. Supp., at 79-80, Pet. A. 185-86.)

A proposed metropolitan plan of desegregation (RX 64-66, A. 195-243, Ex. A. 29-31) had been presented at the extensive hearings following joinder of the county and state defendants. The plan was developed by administrators in the Richmond system,[66] and favorable opinions as to its operability were expressed by distinguished educational witnesses (*E.g.*, A. 378, 433, 563). The district judge concluded that the plan was basically workable and that —barring development of a better scheme, which he stood ready to consider—it should be implemented:

> . . . It is to be recognized that Dr. Little in preparing the suggested plan, which the Court finds reasonable, has done so without the benefit of any cooperation from the respective county school officials. Their cooperation and expertise will undoubtedly make the task easier. (338 F. Supp., at 190, Pet. A. 428.)
>
> . . .
>
> The metropolitan plan as now formulated is based on attendance figures from September of 1970. It demonstrates, however, the feasibility of the tech-

[66] During pre-trial conferences, the Richmond Board announced that it would present such a plan at the hearings. The district court urged the parties, and in particular the added state and county defendants, to examine the proposed plan—which the court instructed the Richmond Board to tender prior to the hearing (A. 138)—in order that they might suggest any preferable alternatives and avoid delay in implementation should metropolitan relief be found required (A. 136-40). However, none of the other parties made any alternative suggestions to the district court during the trial. See Appendix B *infra*.

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niques employed. Furthermore, its current form can be brought up to date rapidly to conform to current attendance statistics and capacity figures with a few hours' work with the computer. . . . Any one of the school administrations involved herein could design a desegregation plan to achieve roughly equal racial proportions in schools throughout the Richmond metropolitan area. Neither of the defendant counties has undertaken to develop any proposed desegregation plan in cooperation with the city. It is apparent that the combined efforts of the city, the counties and the state authorities can lead to an even better plan than the one now before the Court—nevertheless the plan now proposed will be acceptable and the Court will be readily available to consider suggested modifications. [338 F. Supp., at 191, Pet. A. 431-32]

The salient features of the Richmond Board's plan are set out in the margin.[67] Because the plan attempted to

[67] The plan redivides the area consisting of the city and the two counties into six subdivisions for purposes of administration. Each subdivision, with the exception of the sixth, would contain a proportion of black and white students roughly equivalent to the system-wide ratio (A. 203-05, 208-12; 338 F. Supp., at 186, Pet. A. 419). Pupils would be assigned to schools within each subdivision or immediately contiguous thereto (A. 206-07; 338 F. Supp., at 186, Pet. A. 419). Generally speaking, students would be exchanged or reassigned on a school-by-school basis, without pairing or grade restructuring (A. 199-201; 338 F. Supp., at 186, Pet. A. 419). The selection of schools between which students would be exchanged was made by computer pursuant to instructions to equalize, for all students insofar as possible, the length of transportation routes (A. 213-18; 338 F. Supp., at 187, Pet. A. 421). The projected assignments would result in pupil populations at each school (except those in Subdivision Six, in the southern part of Chesterfield County) between 20% and 40% black (RX 63; A. 201-06, 214; 338 F. Supp., at 186-87, Pet. A. 419-22). The Board's plan for Subdivision Six, the most sparsely settled (A. 217-18), would eliminate all-white and all-black schools through pairing or

provide for the administration of the desegregated schools in accordance with existing Virginia law insofar as possible,[68] and because its designers were of the view that administrative problems would thereby be eased (A. 240), the plan called for consolidation of the school divisions under the supervision of the State Department of Education. Accordingly, the district court's order (338 F. Supp., at 244-48, Pet. A. 536-45) specified in detail the elements of planning and adjustment that were required to be completed in order to prepare for implementation

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zoning (A. 205-06, 1320-21; 338 F. Supp., at 187, 189, Pet. A. 422-26).

The Richmond Board's plan provided for the selection of students to be exchanged between schools or subdivisions by use of a birthday lottery (A. 223-25; 338 F. Supp., at 187, Pet. A. 422) although it was also suggested that where such a mechanism would result in transportation of undesirable length, noncontiguous zoning could be employed (A. 1322-23; 17 R. 135-45; 338 F. Supp., at 187, Pet. A. 421-23). After county school officials testified that experimental simulated birthday lotteries in the least populated areas of each county (including Subdivision Six in Chesterfield County) resulted in bus routes of inordinate length, the Richmond Associate Superintendent of Schools presented to the court detailed satellite (noncontiguous) zoning proposals and transportation routings for these areas which minimized the transportation time required (RX 96, 96A; CX 30; HX 33; A. 1001-05, 1322-23), including adoption of a noncontiguous zone utilized by Henrico County in 1970-71 (A. 1322-23). See 338 F. Supp., at 190, Pet. A. 427-28).

The maximum number of students who would need to be transported under the proposed plan was 78,000—10,000 more than were transported in the three school divisions (A. 232-34); 338 F. Supp., at 188, Pet. A. 423). (This figure includes both students who would be transported for purposes of integration and those entitled to transportation to the school serving their geographic zone of residence, apart from the desegregation plan (A. 232; 338 F. Supp., at 188, Pet. A. 423)). The district court found that the projected times of transportation for pupils would not exceed those which both counties have required in the past (338 F. Supp., at 188, Pet. A. 424; see A. 988; RX 91; HX 32; 20 R. 79, 137-38; 29 R. 205).

[68] See Appendix D *infra*.

of desegregation throughout the greater Richmond area by consolidating the Richmond, Chesterfield and Henrico school divisions. In its order, however, the district court once again reiterated its willingness to consider other plans to eliminate racially identifiable schools in the region, asking for the submission

> . . . to this Court within seventy (70) days from the date of this Order [of] the modifications required by paragraph g(1) above as well as any other modifications, changes or recommendations, as may be desired by the State Board of Education, the State Superintendent of Public Instruction, the acting school superintendent or the school board created pursuant to paragraph b above. (338 F. Supp., at 246, Pet. A. 541.)

The court had earlier made clear at the conclusion of its comprehensive opinion that:

> While the viable racial mix contemplated by the plan is educationally sound and would indeed result in a unitary system, variations from that suggested viable mix may be unavoidable. All parties are admonished that it is not the intention of the Court to require a particular degree of racial balance or mixing. If in the implementaion of the plan improved modifications seem appropriate, the Court stands ready to entertain them. (338 F. Supp., at 230, Pet. A. 519-20.)

D. *The Court of Appeals' Decision*

On June 5, 1972, following an expedited appeal,[69] the Fourth Circuit reversed (Judge Winter dissenting). The majority opinion (462 F.2d, at 1060-70, Pet. A. 562-83) saw the case as one in which a federal district court had undertaken to "compel one of the States of the Union to restructure its internal government" (462 F.2d, at 1060, Pet. A. 562) "for the purpose of achieving racial balance" (*ibid.*). In arriving at this view, the majority appears to have extrapolated from the District Court's approval of the Richmond Board's plan what it took to be the set of principles that had guided the District Court in its resolution of the legal issues in the case.

Thus, the Court of Appeals proceeded from the recitation that

> . . . the district judge sets out in some detail [notably *only* in his comprehensive detailed findings of fact, which cover virtually all of the evidence in a voluminous record] *the theory advanced by various witnesses* of a "viable racial mix." . . . (462 F.2d, at 1062, Pet. A. 567 [emphasis supplied])[70]

to the very different ascription that

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[69] On January 19, 1972, the District Court denied a stay of its order pending appeal, noting that the order by its terms would not have resulted in the transfer of any students for six months, during which period essentially planning functions would have been carried out (Pet. A. 549-50). February 8, 1972, the Court of Appeals stayed all provisions of the order except those explicitly regarding continued planning, although it left to the State Board's discretion whether a provisional school board for a merged division should be formed; it also expedited the appeals (Pet. A. 553-56).

[70] Dr. Little, Associate Superintendent of the Richmond schools who drafted the Richmond Board plan, did indeed testify that achieving a "viable racial mix" which would promote stable desegregation was one of *his* goals (A. 214).

> In *his* concern to achieve a "viable racial mix," the district court [ordered a tri-division desegregation plan]. (462 F.2d, at 1063, Pet. A. 567 [emphasis supplied]).

Similarly, although the Richmond Board's plan had proposed consolidation of school divisions as the mechanism for an interdivision desegregation plan because, in Dr. Little's judgment, the administration of the desegregated schools would thereby be simplified and education improved for all students (A. 240), the Court of Appeals treated this particular form of plan as an essential element of the case and reversed outright without directing examination of other inter-division alternatives.

The majority thought that the case involved—and involved only—a question of the constitutionality of the existence of adjoining political subdivisions with differing racial demographies. It found that maintaining boundary lines between such subdivisions involved "no constitutional violation" (462 F.2d, at 1070, Pet. A. 583); and it added that the Tenth Amendment barred a contrary holding "absent invidious discrimination in the establishment or maintenance of local governmental units." (462 F.2d, at 1060, Pet. A. 562). It accordingly held that inter-division desegregation was legally impermissible, with the result that we have previously described at pp. 10-11 *supra*.[71]

Summary of Argument

I. Like *Swann*, this case concerns a long-persisting dual school system. It does not present the question whether the mere maintenance of school division lines separating

[71] For a more thorough treatment of the Court of Appeals' opinion, see pp. 46-54, 64-65, and 74-83 of the Petition for Writ of Certiorari herein; pp. 57-62, 70-82 *infra*.

adjacent divisions of differing racial concentration violates the Constitution. Violations are established upon other grounds. This case involves the scope of remedies for them.

It does not involve any question of "racial balance." Nor does it involve any claim that Virginia's maintenance of school division lines between Richmond and the counties is *per se* unconstitutional. The Fourth Circuit wrongly treats the problem of division lines in isolation from the over-all problems of desegregating the Richmond area schools. The District Court did not cross the lines on the theory that they were unconstitutional but upon the finding that, unless they were crossed, desegregation would remain incomplete because Richmond area schools would remain racially identifiable.

Finally, the case does not involve any question regarding the particular form of inter-division relief given here: namely, consolidation. That form of relief was ordered by the District Court because no alternative proposal for inter-division desegregation was advanced by the defendant school authorities.

II. The practical situation confronting the District Court after ten years of efforts to desegregate the Richmond schools made effective desegregation impossible within the confines of the Richmond City school division boundary lines, and therefore required that the lines be crossed. That being so, it is no objection to crossing the lines (as the Fourth Circuit believed) either (1) that the lines are not *per se* unconstitutional, or (2) that a State might not be taxed with violating *Brown* merely because of differing racial ratios in the school populations of adjacent school divisions. Like other structural arrangements of a State's public schools, division lines are sub-

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ject to alteration where necessary to devise an effective remedy for indurate and intractable *de jure* segregation. The State of Virginia, not its several political and educational subdivisions, is responsible under the Constitution for the segregation of the public schools within each subdivision; and the State may not oppose state-created boundaries of local administrative jurisdiction to the effective redress of racial segregation for which it bears the constitutional responsibility.

III. This does not imply, of course, that federal district courts are free entirely to ignore school division lines in the fashioning of desegregation decrees. The practical problems entailed by inter-division plans are among the "practicalities" that the district judges are obliged to consider. In addition, a State's decisions regarding the manner in which its public school system should be subdivided, while not entitled to an invariable, inflexible preference over other concerns relevant to the formulation of an effective school desegregation plan, are entitled to substantial weight. In the present case, however, a combination of factors deprives the boundary lines between Richmond and the counties of much of the weight that they might otherwise possess, and overwhelmingly supports the District Court's conclusion to cross those lines. Principally:

(A) Virginia law, Virginia public officials, and Virginia school authorities have historically crossed or ignored school division lines in the service of numerous interests, including the interest of segregation. A concern for local autonomy that has been so often subordinated to other interests by Virginia law and practice ought not suddenly to be honored as a categorical imperative when it conflicts with the interest of effective school desegregation.

(B) The District Court properly found that the Richmond, Chesterfield and Henrico school divisions constitute a single educational community within which the purposes and promises of *Brown* require an elimination of racially identifiable schools. Fundamentally, *Brown* is concerned with the unmistakable stigma of second-class citizenship that "separate but equal" schools attach to black Americans, and with the destructive impact of that stigma upon the education of black children. Implementation of *Brown* requires the eradication of all arrangements of the public educational institutions of a State which perpetuate the stigma or reinforce its effects. In the context of the history and the current circumstances of the Richmond area schools, a desegregation plan which leaves racially identifiable black Richmond City schools sequestered by division boundary lines from closely adjoining one-race white county schools would also leave the vital aims of *Brown* completely thwarted.

In that context, the Fourth Circuit's judgment perpetuates the same old system of "white" schools and "black" schools that the Richmond area has always had. This kind of dual system is not ended by a process in which Richmond City successfully resists desegregation for eighteen years, and then "desegregates" internally when demographic developments have turned the City so black that "desegregation" makes little change in the racial composition of the schools. In such a process, the principles of *Brown* are not affirmed; they are merely made too unimportant for mobile whites to fuss about. Particularly since the social and economic integration of the Richmond metropolitan area now permits suburban whites to take advantage of everything Richmond has to offer without subjecting their children to schooling with Richmond's blacks, the end result of eighteen years' resistance to

rown is a change in the shape, but not the nature, of e old dual system.

(C) Rampant racial discrimination in housing and other gards throughout the Richmond metropolitan area firmly pports the District Judge's predictive judgment that a chmond-only desegregation plan will hasten the conver- on of the City into a single black ghetto, both by encour- ing white flight and by discouraging white immigra- on. Past and expectable future discrimination in em- oyment and housing interacts with school segregation lock blacks into the isolated existence of the center-city etto. Once this cycle becomes apparent, school authori- s may not ignore it as the setting within which their rangement of school facilities will operate to produce e-race schools. The resulting "black" schools and hite" schools are the State's responsibility; and, whether not their advertent creation would alone violate the nstitution, surely their perpetuation does not satisfy e obligation of either public school officials or a federal trict court to terminate long-time dual school systems oot and branch."

ARGUMENT

I.

Introduction.

Like *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971),[72] this case arises in a State "having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." *Id.*, at 5-6. As in *Swann* and *Green* v. *County School Board*, 391 U.S. 430 (1968),[73] the issues presented are:

> (1) whether the school authorities of such a State have "fully discharged [their] . . . obligation" to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *id.*, at 437-438; and
>
> (2) whether, if not, the District Court's desegregation order (here, requiring an assignment of pupils across state-created school division lines) exceeded its power or constituted an abuse of discretion under the guiding principle that, "[h]aving once found a violation [of *Brown* v. *Board of Education*, 347 U.S. 483 (1954)],[74] the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971).[75]

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[72] Hereafter cited as *Swann*.

[73] Hereafter cited as *Green*.

[74] Hereafter cited as *Brown (I)* or simply as *Brown*.

[75] Hereafter cited as *Davis*.

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We state these issues at the outset in order to extricate the case from the grip of several misconceptions which, with all due respect, appear to have controlled the Court of Appeals' disposition of it:

First, in only the most literal sense is it correct to say, as the Court of Appeals does, that "'this is not primarily a case about segregation required by law, because state law has never required segregation as between Richmond and the neighboring school systems.'" (462 F.2d, at 1065, Pet. A. 571.) This is *exclusively* a case about segregation required by law. The fact that Virginia law has "never required segregation as between Richmond and [the counties]"—a singularly needless requirement during the long years before and after *Brown* when all three school systems were internally segregated by race—might be important if

> (a) the issue here were whether Virginia had ever maintained dual school systems in violation of *Brown*, and
>
> (b) the only basis upon which such a violation was asserted was that Virginia operated three separate school divisions in the Richmond metropolitan area.

But that is not this case. Virginia uncontestably maintained dual school systems in Richmond, Henrico and Chesterfield before 1954, in 1954, and interminably thereafter. (See pp. 5-16 *supra*.) There is no necessity to search for "any constitutional violation in the establishment and maintenance of these three school districts [*sic:* divisions]." (462 F.2d, at 1069, Pet. A. 581.) Violations within the divisions are undisputed and indisputable. The only question now is the scope of the remedy for them.

The answer to that question is not controlled or even clarified by the inquiry to which the Court of Appeals

appears to address much of its opinion: whether, without more, the maintenance by a State of separate school divisions for adjacent areas of differing racial concentration violates the Constitution. The latter inquiry is as much beside the point in Richmond, Virginia as it would have been beside the point in *Swann* to consider whether, without more, a State's use of the neighborhood school system violates the Constitution as applied to neighborhoods of differing racial concentration. The Court in *Swann* was not obliged to decide that assigning "pupils to schools nearest their homes" (402 U.S., at 28) would *per se* constitute a violation of the Equal Protection Clause in a district marked by residential separation of the races but "with no history of discrimination" (*ibid.*). It was enough to hold that such an assignment scheme also was not "*per se* adequate to meet the remedial responsibilities of local boards" [76] in a system with a history of discrimination.

So here, the question is not whether the adventitious occurrence of a 70% black school division sandwiched between two 90% white school divisions, all "with no history of discrimination," would violate *Brown*. It is whether a federal district court is required to accept a 70% black school division sandwiched between two 90% white school divisions as the end result and satisfactory resolution of its decade-long efforts to implement *Brown* in "a system that has been deliberately constructed and maintained to enforce racial segregation." *Swann*, 402 U.S., at 28.

Second, it is plain that the District Court's order was designed precisely and solely to implement *Brown*. The Court of Appeals' characterization of that order as having "the purpose of achieving racial balance" (462 F.2d, at 1060, Pet. A. 562) is unwarranted, insofar as "racial

[76] *Davis*, 402 U.S., at 33, 37.

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balance" means anything other than that "degree of actual desegregation" [77] which the Constitution as construed in *Brown* commands. "Racial balance" in its more usual meaning[78] of a non-constitutional "educational policy . . . that . . . each school should have a prescribed ratio of Negro to white students reflecting the proportion for the [area] . . . as a whole," [79] has nothing to do with this case. The District Judge neither sought to achieve, nor did he actually achieve, "racial balance" in this non-constitutional sense.[80]

Third, what the District Judge did seek to achieve was "the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools." (338 F. Supp., at 79, Pet. A. 185-86). Pursuing that objective in the light of this Court's admonition to "consider the use of all available techniques," *Davis*, 402 U.S., at 37 (1971), he first examined the extent to which desegregation could be effected within the confines of the Richmond City school division boundary lines, and found it "pathetically incomplete." (338 F. Supp., at 103, Pet. A. 237.) See pp. 66-68, 86-87 *infra*. He then considered the practicability of, and eventually adopted, a desegregation plan that went beyond the boundaries of Richmond. See pp. 38-49 *supra*.

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[77] *Swann*, 402 U.S., at 26.

[78] See *Swann*, 402 U.S., at 16-18; *Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971); *Drummond* v. *Acree*, 409 U.S. —— (1972) (Mr. Justice Powell, in Chambers).

[79] *Swann*, 402 U.S., at 16.

[80] We discuss this point in detail in Appendix A, *infra*. Because of the prominent place of the "racial balance" misconception in the Court of Appeals' opinion, it deserves thorough treatment. But we confine that treatment to an appendix because it *does* concern a misconception, and ought not deflect attention from the essential issues of the case.

By contrast, the Court of Appeals treats the decision to cross Richmond's boundaries as though it were unrelated to the underlying, intractable problems of desegregating the Richmond schools. Remarkably, its opinion does not discuss the District Court's extensive factual findings regarding the inadequacy of Richmond-only desegregation, nor does it even mention the essential predicate of the District Court's order: that all proposed plans of desegregation which dealt with Richmond and the surrounding counties as air-tight compartments left "both individual facilities and entire systems racially identifiable." (338 F. Supp., at 80, Pet. A. 186) Thus the Court of Appeals demands that a justification for crossing school division lines be found in some unconstitutional feature of those lines themselves (462 F.2d, at 1066-1067, 1069, Pet. A. 575-78, 581), rather than in "the implicit command of *Green* v. *County School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy" [81] for violations of the Constitution dating back eighteen years to *Brown*.

But surely *Brown (II)*[82] assumed and *Swann* squarely held that the forms in which a State arranged its public school system, although not themselves unconstitutional, were necessarily subject to adjustment by the district courts in "the framing of equitable remedies to repair the denial of a constitutional right." *Swann*, 402 U.S., at 15-16. Contiguous geographic zones and traditional grade structures, for example, may have no inherent constitutional vice; yet the courts are authorized to alter them where necessary to desegregate a segregated system. The question in the present case is whether, uniquely, school divi-

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[81] *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

[82] *Brown* v. *Board of Education*, 349 U.S. 294 (1955) [hereafter also cited as *Brown (II)*].

sion lines are immune against "remedial adjustments . . . made to eliminate the dual school systems." *Swann*, 402 U.S., at 28. It is not whether the establishment and maintenance of school divisions are unconstitutional or have "any unconstitutional consequence" in isolation from the long-time *de jure* segregation of the Richmond area schools. (462 F.2d, at 1069, Pet. A. 581.) It is certainly not whether "various enactments of the Legislature of Virginia structuring Virginia's system of free public schools" are "invalid." (462 F.2d, at 1067, Pet. A. 515) It is simply whether, having made a finding that the crossing of these particular school division lines was "the only remedy promising of immediate success—not to speak of stable solutions" (338 F. Supp., at 100, Pet. A. 230) in the context of its efforts to desegregate the Richmond schools, the District Court lacked power or discretion to cross them.

Fourth, this latter question hardly implicates any general assertion of a sweeping power in the district courts to "compel one of the States of the Union to restructure its internal government." (462 F.2d, at 1060, Pet. A. 562) To be sure, the District Court here did finally order a consolidation of three Virginia school divisions pursuant to the consolidation provisions of Virginia law.[83] But that particular form of an inter-division desegregation plan—as opposed, for example, to an order requiring the assignment of pupils across school division lines[84]—came about

[83] See Appendix D *infra*.

[84] The only critical feature of the relief sought in this case was that it not be compartmentalized by existing school division lines—that some pupils cross division lines, so that schools would not remain racially identifiable. Whether this result was achieved through consolidation of the present school divisions or through some form of pupil exchange, contractual or otherwise, among them was of no particular moment either to the plaintiffs or as a matter of legal principle. Indeed, as noted above (pp. 41-42 *supra*), the

in this case through the "total failure"[55] of the defendant school authorities to offer any alternative plan involving the exchange of pupils between Richmond and the surrounding counties.[56] The Chesterfield and Henrico school boards and the Virginia State Board of Education stood adamantly on the proposition—which the Court of Appeals below has now fully approved—that school division lines are sacrosanct and impermeable against any form of school desegregation decree. The correctness *vel non* of that proposition is at the heart of this case.

II.

The District Court Did Not Lack Power to Order an Inter-Division Desegregation Plan.

A. *The Scope of Federal Judicial Power to Terminate Dual School Systems.*

The District Court believed that its power to fashion a desegregation plan reaching beyond a single school division rested upon two essential predicates. The first was

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amended complaint filed by the plaintiffs sought *either* merger *or* assignment of pupils across division lines within the existing structure (A. 107-08). Virginia law provides more than one mechanism by which such assignment could be accomplished: operation of joint schools (Va. Code Anno. §22-7 [Repl. 1969]), contractual agreement (Va. Code Anno. §22-99 [Repl. 1969]); see generally, *Wright* v. *County School Bd. of Greensville County*, 309 F. Supp. 671 (E.D. Va. 1970), *rev'd* 442 F.2d 570 (4th Cir. 1971), *rev'd sub nom. Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972).

[55] *Swann*, 402 U.S., at 25.

[56] We discuss this point in Appendix B, *infra*. As we mention there, neither the District Court's opinion nor its order precludes modification of the consolidation plan proposed by the Richmond School Board and approved by the District Court, in the event that another equally effective form of inter-division desegregation plan is subsequently brought forward by any party.

that the public schools in the area had been immemorially segregated in violation of the Constitution as construed by *Brown*. The second was that any form of remedial decree confined within the limits of one division would be ineffective "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S., at 15.

We submit it is apparent that these two predicates amply sustain federal judicial *power* to extend the remedial process of a district court across state-created school division boundary lines. Questions going to discretion in the exercise of the power (See Part III of this Brief, pp. 82-98 *infra*) should not be confused with the fundamental question of the existence of the power itself. As to the latter, there can be no question.

For the competence of federal equity to secure "complete justice" [87] upon a finding of a violation of federal law is no mere latter-day invention of the second *Brown* decision. It is an established, as it is an indispensable,[88] attribute of the equitable jurisdiction of the federal courts. *E.g., Camp* v. *Boyd*, 229 U.S. 530, 551-52 (1913); *Hecht* v. *Bowles*, 321 U.S. 321, 329-30 (1944); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); cases cited in notes 108-10, 112-13, *infra*. Specifically vouchsafed by statute since 1871 to enforce the Equal Protection Clause of the Fourteenth Amendment,[89] that power has always been given the widest latitude by the decisions of this Court.

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[87] *Brown* v. *Swann*, 35 U.S. (10 Pet.) 497, 503 (1836).

[88] "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[89] The history of section 1 of the Civil Rights Act of 1871, now Rev. Stat. §1979, 42 U.S.C. §1983, is canvassed in *Monroe* v. *Pape*, 365 U.S. 167 (1961).

E.g., McNeese v. *Board of Education*, 373 U.S. 668 (1963); *Griffin* v. *County School Board*, 377 U.S. 218 (1964). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S., at 15. See, *e.g., Louisiana* v. *United States*, 380 U.S. 145 (1965). And when "'the public interest is involved . . ., those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960). *See Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937).

So we take it to be settled that, "[h]aving once found a violation," *Davis*, 402 U.S., at 37, the District Court had "not merely the power but the duty to render a decree which [would] . . . so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). On this record, neither the violation nor the necessity for inter-divisional relief to "achieve the greatest possible degree of actual desegregation," *Davis*, 402 U.S., at 37, and prevent resegregation rooted in the persisting effects of past discrimination, *cf. Raney* v. *Board of Education*, 391 U.S. 443, 449 (1968), can be doubted.

As for violation, it is altogether obvious that unconstitutional dual school systems were maintained in Richmond, Chesterfield and Henrico both before and long after *Brown*. See pp. 11-16 *supra*. Although the District Court was concerned primarily with Richmond City as the original subject of this litigation and the most intractable of the three jurisdictions to desegregate,[20] it also made explicit

[20] The District Court's findings as to the history of segregation in the Richmond City schools are set forth at 338 F. Supp., at 70-

findings of segregation in Chesterfield[91] and Henrico,[92] as well as findings of state-wide segregatory practices by Virginia State educational authorities.[93] The Court of Appeals did not controvert those findings factually, although —consistently with its Balkanized view of *Brown*[94]—it did conclude that the District Court's April 5, 1971 desegregation plan for the operation of the Richmond City schools during 1971-72 (see note 62, *supra*) "belatedly" brought Richmond to the "juncture [where it had] done all it can do to disestablish to the maximum extent possible the formerly state-imposed dual school system within its municipal boundary" (462 F.2d, at 1061, Pet. A. 563); and the Court of Appeals similarly found that, as of the same school year, Henrico and Chesterfield had achieved internal "unitary" status—the latter by eliminating "the racial identifiability of the Central Gardens School" (462 F.2d, at 1065, Pet. A. 571) which had operated as a 96% black facility throughout 1970-71 (338 F. Supp., at 239, Pet. A. 529), and the former by severing formal county ties to the Matoaca Lab School which continues to operate as a 100%

79, Pet. A. 165-84. Its findings that the schools remained segregated at the time of its opinion appear at 338 F. Supp., at 80-81, 90, 100, 103-05, Pet. A. 186-88, 208, 230, 237-39.

[91] The District Court's findings as to the history of segregation in the Chesterfield County schools are set forth at 338 F. Supp., at 133-38, 163-71, Pet. A. 301-13, 368-86. Its findings that those schools remained segregated at the time of its opinion appear at 338 F. Supp., at 80-81, 90, 100, 103-05, Pet. A. 186-88, 208, 230, 237-39.

[92] The District Court's findings as to the history of segregation in the Henrico County schools are set forth at 338 F. Supp., at 127-33, 171-76, Pet. A. 289-301, 387-89. Its findings that those schools remained segregated at the time of its opinion appear at 338 F. Supp., at 80-81, 90, 100, 103-05, Pet. A. 186-88, 208, 230, 237-39.

[93] See 338 F. Supp., at 92-97, 138-57, Pet. A. 212-23, 313-56.

[94] See note 101 *infra*.

black facility within its geographic boundaries (A. 1024). (462 F.2d, at 1065, Pet. A. 571-72.) Since the "opening of the 1971-72 school year . . . took place during the trial of this case" (338 F. Supp., at 104, Pet. A. 238), we believe that the District Court's characterization of "unitary status" in the three divisions as "[m]omentary . . . assuming it existed . . .—which has not been shown" (*ibid.*) is altogether accurate.

So there were uncontestable violations. That brings us to the one major point on which the Court of Appeals and the District Court were thoroughly agreed: that, within the boundary lines of the three school divisions, nothing more can be done than has already been done to "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis*, 402 U.S., at 37. This conclusion is at once the basis upon which the District Court found that an inter-divisional school desegregation plan was factually necessary,[95] and the basis upon which the Court of Appeals conversely concluded that the three school divisions were each legally "unitary" (462 F.2d, at 1061, 1065, Pet. A. 563, 571-72). But it is undisputed and indisputable that this "unitary" system consists of a black island in a white sea. (See pp. 5-11, 30-33 *supra*.) Richmond, containing a school population that is 69% black[96] (with one-fifth of its schools ranging from 80% to 89% black) (338 F. Supp., at 240-242, Pet. A. 530-32), is entirely surrounded by two counties whose school popula-

[95] ". . . [T]he 'desegregation' of schools within the city and the counties separately is pathetically incomplete. Not only is the elimination of racially identifiable facilities impossible of attainment, but the partial efforts taken contain the seeds of their own frustration." (338 F. Supp., at 103, Pet. A. 237); see also 338 F. Supp., at 100, Pet. A. 230; pp. 43-44 *supra*.

[96] For the 1971-72 school year, 13,500 white students and 29,747 black students were enrolled in the Richmond schools. (338 F. Supp., at 185, Pet. A. 417.)

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tion is 91% white.[97] As between Richmond and the counties, "great disparities in 1971 racial composition . . . [make] both individual facilities and entire systems racially identifiable." (338 F. Supp., at 80, Pet. A. 186.)

Black Richmond schools and white county schools lie virtually on top of one another. (See Table 1, p. 8 *supra.*) Richmond's black John Marshall High School (73% black in 1970, 78% black in 1971) is 1.4 miles (eight blocks) from the 96.1% white Henrico High School; Richmond's black Highland Park School (90% black in 1970, 85% black in 1971) is 1.3 miles from Henrico's 99.8% white Glen Lea School; and the District Court's opinion identifies nine other "schools of extremely divergent racial composition . . . located a very short distance apart" (338 F. Supp., at 190, Pet. A. 428-29) across the school division lines. It is little wonder that an expert witness for the county and state defendants "conceded that a child, observing two schools on different sides of a jurisdictional boundary, with widely disparate racial compositions, would not be sufficiently sophisticated to know most of the forces and factors which brought forth such racial composition, but would simply perceive the existence of black and white schools." (338 F. Supp., at 200, Pet. A. 451.) Those "black and white schools" are perpetuated—immune against conversion into "just schools," *Green*, 391 U.S., at 442—if, as the Court of Appeals held, school division boundary lines are not crossed. (See Table 2, p. 10 *supra.*)

In addition, the black Richmond schools are growing blacker: during the 1970-71 and 1971-72 sessions, "Richmond schools lost over 7,800 white students from their projected figure [*i.e.*, the figure envisaged in the District

[97] In 1971-72, Henrico enrolled 31,299 white students and 3,018 black students, while Chesterfield enrolled 21,588 white students and 2,166 black students. (338 F. Supp., at 185, Pet. A. 417-18.)

Court's interim Richmond-only desegregation plan]" (338 F. Supp., at 185, Pet. A. 417). This loss of "39% of its white students in the past two years" (338 F. Supp., at 103, Pet. A. 237) was a significant consideration in the District Judge's finding that any attempts to desegregate Richmond schools within the closed confines of the Richmond school division would "contain the seeds of their own frustration" (see note 95, *supra*).

To say that the command of *Brown (II)* stops at this point, that the schools of Richmond are now "unitary,"[98] or that "the greatest possible degree of actual desegregation" has been achieved,[99] requires a remarkably narrow conception of *Brown* and of those phrases. To appreciate how narrow it is, one needs only to compare the conditions under which the Fourth Circuit shuts off further constitutional relief in Richmond-Chesterfield-Henrico (see pp. 7-11 *supra*) with the conditions under which this Court approved extensive further constitutional relief in Charlotte-Mecklenburg and Mobile. Plainly enough, if Virginia law had constituted Richmond and the two entirely surrounding counties as a single school division, in the way that North Carolina law includes the City of Charlotte and the County of Mecklenburg within a single school division, the Fourth Circuit would have affirmed—and would have been required by *Swann* to affirm—the District Court's desegregation order here.[100] Or if what lay between

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[98] See *Green*, 391 U.S., at 438; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

[99] *Davis*, 402 U.S., at 37.

[100] The Court of Appeals raises no objections to the District Court's exercise of the "equitable remedial discretion" whose "breadth and flexibility" were confirmed in *Swann*, 402 U.S., at 15, 25, 27, other than objections following from the interdivisional character of the District Court's decree. To the extent that those latter objections are practical rather than doctrinal, we discuss them in Appendix D *infra*. For present purposes, it suffices to

Richmond City and Henrico were not an intangible boundary line "so irregular and complex that it often confuses veteran service personnel of both jurisdictions" (RX 89, Ex. A. 34), but a "major north-south highway" (*Davis*, 402 U.S., at 36), the highway could not have stood as an

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note that the methods of desegregation embodied in the Richmond School Board plan that the District Court approved (see pp. 46-49 *supra*) are well within the scope of remedial methods authorized by *Swann*. We have earlier pointed out, for example, that no inordinate transportation of students is involved (note 67, *supra*); the Court of Appeals had no difficulty in concluding that "[t]his is not a bussing case" (462 F.2d, at 1061 n. 2, Pet. A. 563).

Specifically, the number of students who would require bus transportation—including both those who lived beyond walking distance from the school to which they were assigned under the separate divisions' geographic zoning schemes (A. 226-27, 232; 17 R. 65, 96) and those reassigned to achieve desegregation—was projected at 78,000 (A. 232). During a typical 1970-71 school day, Henrico and Chesterfield Counties transported 25,000 and 24,000 pupils, respectively; under its 1971-72 plan (see note 62 *supra*), Richmond anticipated transporting 21,000 pupils (A. 233-34). Thus the metropolitan plan called for additional busing of 8,000 to 10,000 students from among a total of 104,000 *(ibid.)*.

Execution of the plan is within the combined means of the school divisions: they own a sufficient number of buses not only to carry the 78,00 students but also to provide transportation for students participating in extracurricular activities (A. 233-38). Dr. Little estimated the maximum time any student would be bussed as 45 minutes in most instances, up to 55 in a few, and up to one hour in areas of Subdivision Six (see note 67 *supra*)—southern Chesterfield County (A. 238). These times are comparable to existing county route travel times and those proposed for 1971-72 in Richmond (RX 79, 80, 91; HX 32; CX 29; A. 238, 988; 29 R. 205), and the Chesterfield County Superintendent of Schools testified that a one-hour trip was not inordinate (20 R. 79, 137-38). Indeed, some students were transported as long as two hours each way in 1970-71 in that county (29 R. 205). As late as 1965, Henrico was requiring black students to ride long distances and even transfer buses in order to attend segregated schools (29 R. 187), and Chesterfield bussed some black students 1¾ hours to an all-black high school (29 R. 242).

Dr. Little recommended that wherever the lottery method resulted in bus routes of undesirable length, alternative means of pupil assignment such as noncontiguous zoning be employed (see note 67 *supra*).

impassable frontier against *Brown*. Put another way, unless some categorical legal principle invests state-drawn school division lines with the unique capacity to transmute racially identifiable schools into "unitary" ones by passing among them, the implementation of *Brown* in the greater Richmond area remains, as the District Court concluded, "pathetically incomplete" (338 F. Supp., at 103, Pet. A. 237).

The Court of Appeals held that division boundary lines have precisely this legal capacity: that they stand as the absolute, unbudgeable outer limits of federal-court desegregation decrees.[101] The result is that the implementation

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[101] The Court of Appeals states this proposition in two principal ways, and suggests it in a third:

The first way begins with the Tenth Amendment premise that "[o]ne of the powers . . . reserved to the states is the power to structure their internal government" (462 F.2d, at 1068, Pet. A. 579), and proceeds to the conclusion that school district lines, as components of that structure, may not be breached by a federal court unless they have been " 'used as an instrument for circumventing' " constitutional rights of racial equality (462 F.2d, at 1069, Pet. A. 580). In this formulation, the Fourth Circuit apparently conceives an "instrument" as something "intended to circumvent" the Constitution (462 F.2d, at 1068-69, Pet. A. 580); hence it holds that the boundary lines of local governmental units are unalterable by a federal court seeking means to effect desegregation "absent invidious discrimination in the establishment or maintenance of . . [those] units" (462 F.2d, at 1060, Pet. A. 562), or invidious "motivation" in the placement of the lines (see note 102, *infra*). Related to this theory is the court's statement that "[t]o approve the consolidation of these three school districts would require us to ignore the tradition and history of the Commonwealth of Virginia with respect to its establishment and operation of schools, as well as hold invalid various enactments of the Legislature of Virginia structuring Virginia's system of free public schools" (462 F.2d, at 1066-67, Pet. A. 575; see also 462 F.2d, at 1064, 1066-67, Pet. A. 570-71, 575-78). Notably, the tradition and history of Virginia have been to prefer school segregation to local school district autonomy, while preferring local school district autonomy to desegregation. (See pp. 22-24, Appendix E, *infra*). And to break with this tradition by crossing school district lines for the purpose of segregation, as the District Court did, does not

of the Constitution within a State depends upon the manner in which the State carves up its public school system into administrative units.[102] The further, tragic, result is that

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require the invalidation of any Virginia statutes: it requires only recognition that, by reason of the Supremacy clause, no Virginia statutes (whether or not they are otherwise valid) can confine the power of a federal court to "consider the use of all available techniques" for dismantling dual school systems, *Davis*, 402 U.S., at 37. See pp. 76-77 *infra*. In this setting, the Fourth Circuit's invocation of Virginia tradition and law highlights the inflexible character of its Tenth Amendment holding.

Its second major way of asserting the inviolability of school district lines is to treat individual school districts, which concededly have long maintained the sort of dual school systems condemned by *Brown (I)*, as becoming "unitary" and thus escaping the remedial powers of the federal courts under *Brown (II)*, so soon as desegregation has been pursued to the fullest extent that it can be pursued within the separate boundaries of each district and without crossing district lines. (See 462 F.2d, at 1060-61, 1065, 1069-70, Pet. A. 563, 564-65, 571-72, 580-81, 582-83). Unless "there was ever joint interaction between any two of the units involved (or by higher state officers) for the purpose of keeping one unit relatively white by confining blacks to another" (462 F.2d, at 1065, Pet. A. 572), the units are to be viewed as watertight compartments for purposes of the application of both *Brown (I)* and *Brown (II)*. (462 F.2d, at 1069-70, Pet. A. 582-83.) The Fourth Circuit can find no such joint interaction in the case of Richmond, Chesterfield and Henrico (462 F.2d, at 1065-66, Pet. A. 572-74), in part because racial discrimination has been so pervasively practiced in all three that it could not have differentially driven blacks from one to the other (462 F.2d, at 1066, Pet. A. 573-74).

Third, the Court of Appeals expresses concern over various practical problems that it perceives in the District Court's inter-district desegregation plan (see Appendix D, *infra*), although it nowhere suggests that these problems approach the level of magnitude which would justify reversing a district judge's discretion under *Swann*. See 402 U.S., at 31. This is to say that the *Swann* principles are inapplicable across school district lines. See note 135 *infra*.

[102] The Court of Appeals excepts, of course, cases in which the drawing or maintenance of the boundary lines can be proved to be racially "motivated" (462 F.2d, at 1064, Pet. A. 571), or "invidious" (462 F.2d, at 1069-70, Pet. A. 582-83), or "intended" (462 F.2d, at 1069, Pet. A. 580) or done with the "purpose" (462 F.2d, at 1064, 1065, Pet. A. 571, 572) of segregating the public schools by race. This invidious-motivation test not only flies in the

fulfillment of the hopes of *Brown* is effectively denied to hundreds of thousands of black children locked into urban school divisions which "appear to be completely beyond hope of meaningful desegregation, absent some dramatic change in their boundaries." [103]

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teeth of principles long established and found necessary to protect the right of Equal Protection of the Laws against evisceration. See, *e.g.*, *Cassell* v. *Texas*, 339 U.S. 282, 287-90 (1950) (plurality opinion); *Turner* v. *Fouche*, 396 U.S. 346, 360-61 (1970); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 460-62 (1972); *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970, per Mr. Justice Clark, sitting by designation); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1170, 1175-76 (2d Cir. 1972), and cases cited; *Hawkins* v. *Town of Shaw*, 461 F.2d 1171, 1173 (5th Cir. 1972); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). *Cf. Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and see *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). It is also wholly illusory as a practical matter, in view of the extraordinary difficulties involved in proving that racial animus underlies the failure to change existing divisional boundary lines, even where this is the fact. The difficulties are exemplified in the present case, where the District Court found from the history of Virginia's treatment of school division lines and from the lack of other substantial justifications for insisting upon the inflexibility of those between Richmond and the counties, that "resistance to the [inter-divisional desegregation] proposal appears clearly to be racially based" (see note 137 *infra*), while the Court of Appeals—without disputing the factual bases of this inference—concluded:

> It is not contended . . . that the establishment of the school district lines more than 100 years ago was invidiously motivated. We have searched the 325-page opinion of the district court in vain for the slightest scintilla of evidence that the boundary lines of the three local governmental units have been maintained either long ago or recently for the purpose of perpetuating racial discrimination in the public schools. (462 F.2d, at 1064, Pet. A. 571.)

[103] *United States* v. *Board of School Commissioners*, 332 F. Supp. 655, 677 (S.D. Ind. 1971). At pp. 54-63 of the Petition for Writ of Certiorari herein, we describe in detail these urban areas, where "solutions not involving suburban participation no longer are possible," 1 UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: RACIAL ISOLATION IN THE PUBLIC SCHOOLS (G.P.O. 1967 0-243-637) (1967) 154.

If this is to be so, we respectfully suggest there should be some compelling reason why it is so. The reasons advanced by the Court of Appeals are clearly insufficient.

B. *The Court of Appeals' Objections to an Inter-Division Desegregation Plan.*

(1) Throughout its opinion, the Court of Appeals expresses in varying ways the proposition that it is "unable to discern any constitutional violation in the establishment and maintenance of these three school districts [*sic:* divisions], nor any unconstitutional consequence of such maintenance" (462 F.2d, at 1069, Pet. A. 581).[104] We have previously noted at pp. 57-58 *supra*, that this focus appears to confuse the issues of violation and remedy. Violations of *Brown* in all three divisions were established. See pp. 64-66 *supra*. They were not required to be established on the grounds that the school division lines themselves segregated black children,[105] in order to warrant relief which crossed the lines.[106] See p. 60 *supra*.

(2) It is probable that the Court of Appeals concerned itself with issues of "constitutional violation" on the view

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[104] The same theme appears, for example, in the court's acceptance of the proposition that "'this is not primarily a case about segregation required by law, because state law has never required segregation between Richmond and the neighboring school systems'" (see p. 57 *supra*), and in the court's statement of the issue presented in the case as "whether the maintenance of three separate unitary school divisions constitutes invidious racial discrimination in violation of the Fourteenth Amendment" (462 F.2d, at 1065, Pet. A. 572).

[105] It was, of course, neither necessary nor possible for school division lines to segregate black children during the century that they were equally and more than sufficiently segregated by other devices on both sides of the lines.

[106] One might as well demand that the highway traversing Mobile has been demonstrated to be an instrument of segregation in *Davis* before the highway could be crossed as part of a plan to desegregate that city.

that an arrangement of the public schools which was not forbidden by *Brown* "as a matter of substantive constitutional right" [107] could also not be forbidden to the State by a federal court enforcing *Brown*. Upon this view, the District Court was obliged to leave Richmond's school division lines intact unless it could be said that the mere maintenance of those lines between geographic areas of differing racial density was prohibited by the Equal Protection Clause. *Cf. Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd per curiam*, 404 U.S. 1027 (1972).

The view is fundamentally unsound. Equitable relief "is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is 'necessary and appropriate in the public interest to *eliminate the effects*'" of the evil that required equity's intervention.[108] It goes without saying that, if the litigation is protracted and the evil takes new forms, equity has ample power to pursue it.[109] Indeed, it is the "duty of the court to modify . . . [a] decree so as to assure the complete extirpation of the illegal" conduct.[110]

School desegregation cases have always proceeded on these premises, as *Green* and *Raney* v. *Board of Education*, 391 U.S. 443 (1968), attest. The square holdings of *Swann* and of the "splinter district" cases last Term[111] finally

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[107] *Swann*, 402 U.S., at 24.

[108] *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 n. 8 (1972) (emphasis in original).

[109] See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971) (dictum).

[110] *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968).

[111] *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972).

conclude the issue. For in each of those cases the relief approved by the Court overrode arrangements of a school system which the Court assumed would not themselves violate *Brown*.

(3) Nor does the Court of Appeals rest on firmer ground insofar as it precludes inter-division relief for failure to find that the school division lines had an "unconstitutional consequence" in the Richmond setting. Desegregation decrees are designed to end segregation, not merely its methods and its causes. It has never been thought prerequisite to the modification of some aspect of a segregated system that the particular aspect modified be shown to have an unconstitutional operation or effect. To the contrary, "equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid." [112] The point has been made again and again in anti-trust cases:

> A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with the acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited.[113]

So it is in school cases. Each provision of a school desegregation decree "need not rest upon an independent con-

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[112] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 148 (1948).

[113] *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950). In addition to the cases cited in *Gypsum*, see, *e.g.*, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189-90 (1944); *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53 (1962).

stitutional violation." *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 459 (1972).[114] It may speak to whatever arrangements of the school system "would either perpetuate racial segregation in the schools . . . or otherwise frustrate the dismantling of the dual system . . . ." *Id.*, at 471 (dissenting opinion of the Chief Justice). The constitutionality of those arrangements in and of themselves cannot insulate them from modifications necessary to desegregate the schools.

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder the vindication of federal constitutional guarantees. (*North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971).)

(4) Thus the Court of Appeals is incorrect that "[t]o approve the consolidation of these three school districts [*sic*: divisions] would require us to . . . hold invalid various enactments of the Legislature of Virginia structuring Virginia's system of free public schools" (462 F.2d, at 1066-67, Pet. A. 575). The consolidation ordered by the District Court is entirely consonant with Virginia law allowing and providing detailed mechanisms for the consolidation of school districts,[115] except on one single point. That point is the provision of Va. Code § 22-30, "enacted since the joinder of state and county defendants in this case" (338 F. Supp., at 99, Pet. A. 228),[116] which prohibits the State Board of Education from creating school districts composed of more than a single city or county without consent of the

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[114] Hereafter cited as *Wright*.

[115] See Appendix D *infra*.

[116] See Appendix E, at p. 5e *infra*.

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local school boards and governing bodies. This provision does not oppose any obstacle to the District Court's decree except the obstacle that is instinct in any situation where a judicial decree is called for—the unwillingness of the party against whom the decree runs to do what it compels without its compulsion. It need not be held "invalid" for the obvious reason that, whether valid or invalid, it cannot trammel the power of a federal court of equity. *See, e.g., Wright; Haney* v. *County Bd. of Education*, 429 F.2d 364, 368-369 (8th Cir. 1970). But to the extent that this latter proposition amounts to a narrow ground of "invalidation" of the provision as applied under the Supremacy Clause, that is no novel or troublesome result. *North Carolina State Board of Education* v. *Swann, supra.*

(5) It is also not a result that can be said to ignore "a fundamental principle of federalism incorporated in the Tenth Amendment . . ." (462 F.2d, at 1061, Pet. A. 563). The Tenth Amendment—expressing "but a truism that all is retained which has not been surrendered"[117]—does not restrict the power of the federal courts to enforce the Fourteenth. *E.g., Baker* v. *Carr*, 369 U.S. 186 (1962); *Hunter* v. *Erickson*, 393 U.S. 385 (1969). And the pronouncements in *Hunter* v. *Pittsburgh*, which the Court of Appeals quotes as confirming the "absolute discretion" of a State with regard to its municipal corporations,[118] do not speak to situations in which the consequences of the exercise of that discretion collide with federally guaranteed rights. The law of this Court governing such collisions has been settled for 100 years,[119] and state power over the

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[117] *United States* v. *Darby*, 312 U.S. 100, 124 (1941).

[118] *Hunter* v. *Pittsburgh*, 207 U.S. 161, 198 (1907), cited in 462 F.2d, at 1068, Pet. A. 579.

[119] *Broughton* v. *Pensacola*, 93 U.S. 266 (1876); *Mount Pleasant* v. *Beckwith*, 100 U.S. 514 (1879); *Mobile* v. *Watson*, 116 U.S. 289 (1886); *Comanche County* v. *Lewis*, 133 U.S. 198 (1890); *Shap-*

organization and structure of political subdivisions has been consistently subordinated to "the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed." [120] The Court and the lower federal courts have consequently found no Tenth Amendment obstacle to altering the structure or the boundaries of state school divisions where necessary and proper to enforce the rights of black school children to a desegregated education.[121]

> State legislative district lines, congressional districts and other state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens. . . . Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights.[122]

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leigh v. *San Angelo*, 167 U.S. 646 (1897); *Graham* v. *Folsom*, 200 U.S. 248 (1906); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[120] *Atkin* v. *Kansas*, 191 U.S. 207, 221 (1903) (dictum).

[121] *Wright*; *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971) (referring to the "Comment" in 332 F. Supp. 804, 809-10 (N.D. Ga. 1971)); *Taylor* v. *Coahoma County School District*, 330 F. Supp. 174 (N.D. Miss. 1970-1971), *aff'd*, 444 F.2d 221 (5th Cir. 1971); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), *modified and aff'd*, 447 F.2d 441 (5th Cir. 1971); *Lee* v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971), 455 F.2d 978 (5th Cir. 1972); *Bradley* v. *Milliken*, 6th Cir. Nos. 72-1809, -1814, decided December 8, 1972 (rehearing en banc pending). Pairing of schools across school district lines was also ordered in *Robinson* v. *Shelby County Board of Education*, 330 F. Supp. 837 (W.D. Tenn. 1971), *aff'd*, 467 F.2d 1187 (6th Cir. 1972).

[122] *Haney* v. *County Board of Education*, 410 F.2d 920, 924, 925 (8th Cir. 1969), *subsequent history in* 429 F.2d 364 (8th Cir. 1970).

(6) Ultimately, this latter point is what the Court of Appeals misses. Its opinion comes at the case as though the Fourteenth Amendment and *Brown (I)* spoke severally to the individual school divisions in the State of Virginia, rather than to the State itself. Conceding that each of the divisions of Richmond, Chesterfield and Henrico long maintained dual school systems, it inquires whether each has made its separate peace with the Constitution.

Because each has done all that it can do within its own boundaries, the Constitution is satisfied. Schools that were built to be or become black schools before *Brown* and during seventeen years of recalcitrance thereafter may remain black schools. Previously white schools may remain white schools. So long as the black schools and the white schools are a mile and a half apart on either side of a school division line, no one is responsible. The State of Virginia is not responsible, because—having chosen to assert its prerogative powers only in support of segregation (see pp. 18-24 *supra*)—it now chooses to take no further action.

This approach cannot be squared with authority or reason, with the premises of the Fourteenth Amendment or the promises of *Brown*. To be sure, the named party-defendants in the *Brown* cases were local school systems within the States of Virginia, Kansas, South Carolina and Delaware. But they were not constitutional independent contractors. Each was operating its schools under the segregatory compulsion of state law, and the meaning of *Brown (I)* was to declare those state laws—and every aspect of the dual systems emanating from them—unconstitutional. As Judge Wisdom put it in *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 847 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967): "The two *Brown* decisions . . . compelled seventeen states,

which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, non-racial system." If the *Brown* decisions themselves left any doubt of this, *Cooper* v. *Aaron*, 358 U.S. 1 (1958), did not. "State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." *Id.*, at 7.

Two principles are essential here. The first is that "[t]he fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by the fragmentation of decision making."[123] "The United States Constitution recognizes no governing unit except the federal government and the state."[124] For the long-time growth of racially identifiable black schools within the City of Richmond, it is the State of Virginia, not Richmond alone, that must answer to the Constitution.[125] And its answer cannot be that Richmond is an island, any more than that Prince Edward County[126] or Emporia[127] was.

The second principle is that "[t]he affirmative obligation to seek means of disestablishing state-imposed segregation must be shared by all agencies, or agents of the state . . . who are charged by law with, and who exercise, official

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[123] Brief for the United States as *Amicus Curiae*, in *Griffin* v. *County School Board*, 377 U.S. 218 (1964) (O.T. 1963, No. 592), p. 20.

[124] *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 658 (E.D. La. 1961) (three-judge court), *aff'd*, 368 U.S. 515 (1962).

[125] Virginia law invests state officials with extensive supervisory and policy-making responsibilities, as well as elaborate administrative functions, in the operation of the public schools. See Appendix C, *infra*.

[126] *Griffin* v. *County School Board*, 377 U.S. 218 (1964).

[127] *Wright*.

public school functions." [128] That principle unquestionably reaches both the state and the county defendants here. For many years, they had been participants in the dual system that the District Court sought to end. If affirmative acts, the discharge of affirmative obligations, was necessary by them to disestablish the dual system, the District Court could command them to act.

The contrary conception supposes, as Judge Winter's dissent below puts it, that "each political subdivision is free to operate in its own orbit" (462 F.2d, at 1076, Pet. A. 595) —that neither is a school district obliged to look beyond its own boundaries for available and practicable desegregation techniques, nor is the State obliged to assist it to find them. We submit that *Brown* clearly imposes such obligations.

Within a district, the obligation of *Brown* is to "consider the use of all available techniques including restructuring of attendance zones," with a view to "effectiveness" and to "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." [129] The practicalities may differ when a division line is reached, but not the obligation to consider them. Maximum feasible desegregation remains the objective, and the State remains constitutionally bound to seek it. Especially where state law and practice provide mechanisms for the ready effectuation of inter-division plans,[130] it would be an un-

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[128] *Franklin* v. *Quitman County Board of Education*, 288 F. Supp. 509, 519 (N.D. Miss. 1968). *Accord: Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 478-79 (M.D. Ala. 1967) (three judge court), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *United States* v. *Texas*, 321 F. Supp. 1043, 1056-1057 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), *modified and aff'd*, 447 F.2d 441 (5th Cir. 1971).

[129] *Davis*, 402 U.S., at 37.

[130] See Appendix D, *infra*.

warranted limitation upon *Brown* to say that they need never be considered. In Virginia, with its history of the use of inter-division mechanisms for the purposes of segregation,[131] it would be a travesty.

III.

The District Court Did Not Abuse Its Discretion in Ordering an Inter-Division Desegregation Plan.

Thus far, we have spoken to the question of power, not discretion. We have urged that the "broad remedial powers" [132] of the federal district courts in school desegregation cases are not categorically confined by state-created school division boundary lines. Crossing the lines may therefore be one of the "available techniques" [133] to be considered in an appropriate case.

But the absence of a "flat" or "absolute prohibition" [134] against the crossing of division lines does not mean that decisions to cross lines should be made routinely, or without good cause. Ordinarily considerations of efficiency both in the management of litigation and in the administration of desegregation plans will impel the district judge first to consider—as Judge Merhige did here—whether desegregation can be practicably effected by a single-division plan.

Even if he concludes that the shortcomings of proposed single-division plans require his consideration of inter-division alternatives, he may encounter specific problems in

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[131] See pp. 22-24 *supra*; pp. 84-86 *infra*.

[132] *Swann*, 402 U.S., at 27.

[133] *Davis*, 402 U.S., at 37.

[134] *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

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going beyond the division that suggest the advisability of remaining within it. These, certainly, are among the "practicalities of the situation" that he is obliged to take into account. *Davis,* 402 U.S., at 37. In the present case, the District Court made a thorough canvass of those practicalities and concluded that "Educational and Administrative experts have testified that the proposed [inter-division] plan is a sound and feasible one, educationally and administratively, and the Court so finds." (338 F. Supp., at 192, Pet. A. 432.) That conclusion is fully supported by the record.[135]

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[135] Plainly the Court of Appeals did not reverse the District Court for abuse of discretion in this or any other regard; its decision was placed upon the ground of outright lack of legal power to go beyond the Richmond City limits. See pp. 50-51 *supra.* Nevertheless, it did express concern about three practical aspects of the plan approved by the District Court: the size of the resulting consolidated division (see 462 F.2d, at 1062, Pet. A. 566), "practicalities of budgeting and finance that boggle the mind" (see 462 F.2d, at 1068, Pet. A. 578), and an asserted disregard for policies of Virginia law (see 462 F.2d, 1066-68, Pet. A. 575-78). We discuss the size of the division, with particular reference to student transportation, in notes 67, 100, *supra;* further matters relating to size appear in Appendix D, *infra.* The subjects of financing and consistency with Virginia law are also treated in Appendix D. We think that examination of these materials will disclose: (1) that the Court of Appeals' concern for size—which is voiced in passing, without asserting any conclusion—relates neither to problems of transportation nor to problems of administration; and that there are no such problems of significance; (2) that the finance and budgeting problems are overstated, and represent a substitution of the judgment of the Court of Appeals for that of the District Court which—if the Court of Appeals had undertaken to dispose of the appeal upon this ground—would exceed the scope of appellate review of the District Court's equitable discretion under *Swann;* and (3) that the District Court's order assiduously follows, and is fully supported by, detailed provisions of Virginia law except in one regard: that it overrides the veto against consolidation which Virginia law gives to the counties and their school authorities, see pp. 76-77 *supra.* This last point is therefore not one of practicality at all; it is a restatement of the Court of Appeals' Tenth Amendment ground.

Beyond these practical considerations, it may also be appropriate for the district judge to insist upon a strong demonstration of need before resorting to an inter-division plan. Settled forms of local school administration doubtless should command substantial respect, even though, when a clear showing is made that they "impede the disestablishing of a dual school system, [they] . . . must fall." *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971). On the record now before the Court, both the evidence and the district judge's findings of need are compelling (see pp. 5-35, 42-45 *supra*); and additional factors vitiate the weight that might ordinarily be given to the Richmond-Chesterfield-Henrico school division lines:

A. *Crossings of the Lines to Promote Segregation and Other State Interests.*

As we have pointed out at pp. 22-24, 29 *supra*, Virginia's school division lines which are now erected as insurmountable barriers against desegregation have historically "been ignored when necessary to serve public educational policies, including segregation." (338 F. Supp., at 113, Pet. A. 257; see also 338 F. Supp., at 83, 100, 155-161, Pet. A. 193, 231, 352-64). They "have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system." (338 F. Supp., at 83, Pet. A. 193.) Not only have children been assigned to schools across those lines—most notably, black children sent to black schools pursuant to the policy of *apartheid*—(*ibid.*; see pp. 22-24 *supra*), but the entire structure of local school-division autonomy was promptly scrapped in the first throes of Virginia's massive resistance to *Brown*, and thereafter reassumed subject to various segregatory exceptions such as tuition grants (see pp. 18-20 *supra*; 338

F. Supp., at 84, 92-95, 119-123, 138-146, Pet. A. 194, 212-20, 271-81, 313-31).

Indeed, the post-*Brown* history of public school organization in Virginia is characterized by extreme fluctuation in the extent to which local school divisions determine and delimit such matters as pupil assignment: the only consistent thread seems to be that the role of the divisions waxes or wanes in whatever measure seems best suited to preserve racial separation in the schools. This history, which we collect in Appendix E, *infra*, casts the gravest doubt upon the Court of Appeals' conclusion that the maintenance of the boundary lines between Richmond and the counties has been altogether neutral and uninfluenced by racial considerations.[136] To the contrary, it sustains the District Court's conclusion that the extreme protectiveness displayed by the counties in regard to their boundaries reflects less a concern for local autonomy than a desire to keep blacks out of the county schools.[137] But, however that may be, surely "[b]arriers which did not prevent enforced segregation in the past [should] . . . not be held to prevent conversion to a full unitary system."[138] And a concern for the integrity of school division boundary lines that has been conveniently ignored in the service of other interests preferred by Virginia law and practice should not

[136] See note 102, *supra*.

[137] "Considering the historic flexibility of political subdivisions in the state and in this area in matters of pupil exchange across political boundaries and in the cooperative operation of other public utilities, in view of the several statutory patterns—part of the public policy of the state—under which cooperative ventures can be undertaken, and in view of the fact that school operation in the counties has always entailed transportation times and distances similar to those involved in the suggested metropolitan plan, resistance to the proposal appears clearly to be racially based." (338 F. Supp., at 100, Pet. A. 231.)

[138] *Henry* v. *Clarksdale Municipal Separate School District*, 433 F.2d 387, 394 (5th Cir. 1970).

now be treated as infrangible so soon as it collides with the federal constitutional interest in desegregating schools.

B. *The Indurate Quality of Segregation in the Richmond Area Schools.*

On this voluminous record, the District Judge properly determined that the purposes of *Brown* required him to look beyond the Richmond City limits in order to "eliminate from the public schools all vestiges of state-imposed segregation." [139] *Brown's* essential concern was the stigma of inferiority that segregation visits on its victims, together with the debilitating effect of that stigma on black children. The "effectiveness" [140] of a decree enforcing *Brown* therefore depends on whether it succeeds in rooting out of the schools all arrangements which perpetuate the stigma or reinforce its effects.

This is why *Green* focused upon "[r]acial identification" of schools as to the evil to be remedied. (391 U.S., at 435.) It is why *Swann* recognized a presumption against one-race schools, even in areas of preponderately one-race occupancy. (402 U.S., at 26.) It is why *Wright*, harkening back to the language of *Brown* itself, took account of "adverse psychological effect" in forbidding the secession of white splinter districts. (407 U.S., at 466.)

In the present case, the District Court's conclusion that a Richmond-only desegregation plan would be "pathetically incomplete" (see note 95, *supra*) rests upon its finding that the history and conditions of the greater Richmond schools make "both individual facilities and entire systems racially identifiable" (see p. 43 *supra*). That finding was based not merely upon the gross indications we have described

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[139] *Swann*, 402 U.S., at 15.

[140] *Davis*, 402 U.S., at 37.

above: —the enduring, entrenched resistance to Brown[141] and perseverance of widespread racial discrimination[142] in a region marked by intense and increasing social and economic integration[143] and racial isolation,[144] where 70% and 80% black Richmond schools closely adjoin 90% white county schools,[145] and the total black school population of Richmond is approximately 70% as compared with less than 10% in the surrounding counties.[146] It was also based upon a multitude of details from which "identifiability—a perception of students, faculty and community perception—[in] . . . the historical context within which a school of disproportionate composition exists"—could be inferred (338 F. Supp., at 80, Pet. A. 187).[147]

Within this historical context, a desegregation plan that left black city schools and white county schools facing each other across the imperceptible division boundary lines surrounding Richmond would amount to a betrayal of *Brown*, for numerous reasons.

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[141] Pp. 11-16, 18-22 *supra*.

[142] Pp. 33-35 *supra*.

[143] Pp. 25-29 *supra*.

[144] Pp. 30-33 *supra*.

[145] Pp. 5-11 *supra*.

[146] P. 66 *supra*.

[147] For example, virtually all of the schools built and opened as black schools prior to 1954 which are still in operation remain black. See note 151, *infra*. Similarly, schools intentionally constructed after *Brown* to serve predominantly black or white populations retain their initial character with few exceptions. See pp. 16-17 *supra*. The professional educators whose testimony was credited by the District Court were in accord that the schools —and, indeed, entire school systems—were identifiable by race. *E.g.*, A. 430, 437. And there can be little doubt that the community and schoolchildren also perceive the gross racial disproportions in the schools. See A. 1215-16.

(1) Whatever might be the case in systems never segregated by law, the "white" school and the "black" school have a plain meaning in *Virginia*. Before *Brown*, they stood for white supremacy; after *Brown*, they stood for the success and ingenuity of state officials in maintaining white supremacy despite the Constitution. Virginia and the three Richmond area school divisions never accepted *Brown*. They resisted it by every means within their power. See pp. 11-16, 18-22 *supra*. "This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system." *Green*, 391 U.S. at 438. It did:

(a) Official resistance—and particularly Virginia's massive resistance—to school desegregation put the stamp of public approval upon racist attitudes[148] which assured that black separation signified black inferiority.[149] These attitudes, reinforced by eigh-

[148] In *NAACP* v. *Patty*, 159 F. Supp. 503, 515-16 (E.D. Va. 1958), *rev'd on other grounds sub nom. Harrison* v. *NAACP*, 360 U.S. 167 (1959), the three-judge court described the effect of the massive resistance legislation upon public sentiment toward school integration:

> It was in this setting [footnote omitted] that the Acts now before the court were passed as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees. The agitation involved in the widespread discussion of the subject and the passage of the statutes by the Legislature have had a marked effect upon the public mind which has been reflected in hostility to the activities of the plaintiffs in these cases. This has been shown not only by the falling off of revenues, indicated above, but also by manifestations of ill will toward white and colored citizens who are known to be sympathetic with the aspirations of the colored people for equal treatment, particularly in the field of public education.

[149] Dr. Robert Green, a black educational psychologist who lived in Prince Edward County, Virginia while directing a United States Office of Education study of the effects of that county's

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teen years of calculated evasion of a plain constitutional command, today provide the setting for community perception of the significance of neighboring predominately-white and predominately-black public school facilities.[150]

(b) The repeated pattern of conversion of formerly white schools into predominately black schools without more than a fleeting and unstable period of integration[151] emphasizes that this process involves no repudiation of the dual system. Schools such as Richmond's 70% black facilities are not perceived

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school closing (A. 1251), testified that the pronouncements and actions of State officials in support of "massive resistance," the closing of the Prince Edward County schools, etc., all had a "very long-range unhealthy and negative impact" upon black children (A. 1261). He stated that, in the context of this history, 70%-black Richmond schools and 90%-white county schools would have that same negative impact upon black pupils (A. 1262).

[150] One of the educational expert witnesses for the state and county defendants agreed that the history of massive resistance would affect perception of the Richmond area schools as segregated or integrated (A. 1199), and that a child would be aware of the predominantly black composition of the Richmond schools but not sophisticated enough to comprehend that it resulted from the intangible political jurisdiction boundary (A. 1215-16).

[151] During the past decade and throughout the period when "free choice" or other ineffective approaches to desegregation were being implemented in the city and county systems, numbers of schools have undergone substantial shifts in racial composition from white to black (see 338 F. Supp., at 234-42, Pet. A. 524-32). This process was not limited to Richmond schools, but is illustrated by the increasingly black student body composition at Henrico's Central Gardens Elementary School (338 F. Supp., at 238, Pet. A. 529), which in 1964-65 was an all-white school (A. 589). No black school enrolled a substantial number of white students during this period until the implementation of the interim Richmond plan in 1970-71 and the Central Gardens pairing in 1971-72. The Court of Appeals' decree will increase the number of facilities which have undergone the transition from white to black, as shown by the 1971-72 enrollment figures for Richmond schools (338 F. Supp., at 240-42, Pet. A. 530-32).

as desegregated; they are perceived merely as new locations of segregation.

(c) Nor is this segregation seen as ended when the Richmond City schools, after having been maintained for years in flagrant violation of the Constitution, finally accede within the limits of a City grown so black—and growing blacker—that acceding makes but very little difference now and soon may make none at all.[152] Meanwhile, the capacity of the suburbs to absorb whites has increased;[153] whites may live in the counties and have all the benefits of Richmond for less than a half hour's drive;[154] and *their* schools remain 91% white. Surely even the proverbial dog would know that in this process he has not been tripped on but been kicked.

(d) The very diversity of methods by which Virginia school authorities have sought to evade *Brown*[155] strongly reinforces the perception that a

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[152] See pp. 31-33, 67-68 *supra*.

[153] See HX 24 [lots and subdivisions developed, 1947-71]; HX 24-A [multi-family units, 1960-71]; HX 25, p. 1-3; CX 21 [subdivisions developed, 1950-70]; 27 R. 201-02 [Chesterfield subdivisions developed, 1951-70].

[154] See p. 25 *supra*.

[155] In earlier sections of this Brief we have enumerated in considerable detail the wide range of devices by which Virginia officials have sought to avoid public school desegregation: attempted nullification of *Brown* by the General Assembly, school and school system closings, removal of assignment powers from local division boards, assignment of black students to regional schools, complex pupil placement procedures as a prerequisite to transfer to integrated facilities, "free choice" plans, neighborhood geographic zoning, construction of new schools in locations accessible only to students of one race (sometimes combined with the refusal to furnish student transportation [*cf. Brewer* v. *School Bd. of Norfolk*, 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 905 (1972)]).

Richmond-only desegregation plan would mark the ultimate success of their efforts. Having failed at all else, [156] they have at last found the trick (with the assistance of legislation enacted during this lawsuit):[157] reliance upon school division boundary lines to preserve the affluent suburbs as havens[158] for all-white schools.

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pupil tuition grants and scholarships affording access to public or private segregated schools, non-cooperation with HEW, *etc.* See pp. 16-22 *supra*. To this roster will now be added, as the result of the decision of the Court of Appeals, a rigid insistence upon maintaining existing school division boundaries irrespective of the containment of blacks and the impact upon desegregation.

[156] *See, e.g., James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *app. dis'md* 359 U.S. 1006 (1959) (school closing and operation—Governor); *Griffin* v. *County School Board*, 377 U.S. 218 (1964) (school closing—local board); *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969) (Tuition grants and "scholarships"); *Green* (free choice); *Wright* (splinter districts); *Bradley* v. *School Board*, 382 U.S. 103 (1965) (faculty assignments).

[157] As indicated in Appendix E, at p. 5e *infra*, following the filing of the joinder motion in the present case the 1971 General Assembly amended Va. Code Anno., § 22-30 to forbid the State Board of Education from including more than a single political subdivision in a school division without the consent of the school boards and governing bodies concerned.

[158] Virginia blacks tend, of course, to be poorer than Virginia whites (PX 125); and living in the counties is generally more expensive than living in Richmond. Indeed, some of the witnesses at the trial explained the contrasting racial demographies of Richmond and the two surrounding counties as a result of economic differentials (*e.g.*, A. 167, 501, 862). The relationship had earlier been noted by various of the consultants' studies introduced at the trial. For example, the authors of the 1967 SUA study performed on commission for Henrico and Chesterfield Counties (HX 25, pp. III-2, -5) wrote:

> The outward movement of people has been from the relatively higher income, white segment of the population . . . .
>
> . . .
>
> Chesterfield has a very low percentage of lower income groups, though the percentage has been increasing. Due to the recent

(2) The high degree of social and economic integration of the Richmond metropolitan area (see pp. 25-29 *supra*) has two important implications in this connection:

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development of the County, most of the dwelling units are relatively new. There are few low rent facilities. For this reason, no significant change is anticipated in the number of low income families. For the same reason, the percentage of non-whites in the County is expected to remain almost constant.

Public housing and federally-assisted, low-income, multi-family projects are virtually all located in black areas of the City (A. 605-11, 616-17; see also, A. 472), as are the greater number of unskilled, low-income jobs (A. 176). In 1969, 73% of all families in the greater Richmond area which earned less than $3,000 annually resided in the City of Richmond. They made up 11.6% of Richmond's total number of resident families—but 19.9% of Richmond's resident black families earned less than $3,000 in that year. UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS TRACTS, CENSUS OF POPULATION AND HOUSING, *Richmond, Va. SMSA* (G.P.O. PHC(1)-173, 1972), pp. P-31, Table P-4, Income Characteristics of the Population: 1970, and P-45, Table P-6, Economic Characteristics of the Negro Population: 1970 See also, A. 158. These families generally find housing available to them only in the City:

(a) It causes residents to perceive the metropolitan area as the relevant community for purposes of

	*Richmond**	*Chesterfield**	*Henrico*
Median Value, Single-Family Dwellings on less than 10 acres, owner-occupied	$ 15,400	$ 20,800	$ 18,100
Number of such single-family dwellings valued at less than $10,000	6,518	1,685	2,454
% of all such single-family dwellings valued at less than $10,000	17.5%	11.8%	7.4%
Number of such single-family dwellings valued at more than $25,000	6,908	4,724	7,716
% of all such single-family dwellings valued at more than $25,000	18.5%	33.1%	23.4%
Median contract rent, renter-occupied dwellings except single-family dwellings on more than 10 acres	$78	$99	$112

* As with other 1970 Census statistics referred to in this Brief, see notes 44, 52, *supra*, the figures for Richmond and Chesterfield County are affected by the 1970 annexation. Inasmuch as the development of Chesterfield County is relatively recent (see comments from SMA study quoted above, this note), it is likely that absent the annexation, the median dwelling value and proportion of low-valued homes in Richmond would have been somewhat lower and those figures for Chesterfield County somewhat higher.

Source: UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS TRACTS, CENSUS OF POPULATION AND HOUSING, *Richmond, Va. SMSA* (G.P.O. PHC(1)-173, 1972), p. H-1, Table H-1, Occupancy, Utilization and Financial Characteristics of Housing Units: 1970

Lack of public transportation in the counties also operates to exclude low-income groups (A. 862).

the racial identifiability of schools.[159] Boundary lines that are functionally insignificant in the lives of citizens[160] are not seen as neutral, non-racial explanations for the continued existence of black schools and white schools in close proximity on either side of the lines.[161]

(b) It enables whites to live in Richmond for all practical purposes without sending their children to school with the black children of Richmond. Thus a Richmond-only desegregation plan—particularly in the context of traditional Virginia racial attitudes that have been reinforced by eighteen years of official resistance to desegregation[162]—provides a

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[159] See, *e.g.*:

> . . . I don't see how in this metropolitan area you can separate this issue out. Continuing along the way in which the Richmond school district is developing and which Plan III is likely to further promote, is a school district which would be highly identifiable as a black school district. . . . The fact that you would have in the counties what essentially would be identifiable as a white school system, it is going to be quite obvious to the pupils in the metropolitan area that in a sense you continue to have a dual school district. (A. 437.)

See also, A. 374-76, 445, 562-63.

[160] The lines "coincide with no tangible obstacles and are unrelated to any administrative or educational needs." (338 F. Supp., at 83, Pet. A. 193.) Their location is imperceptible and sometimes bewildering. (See pp. 68-70 *supra*.)

[161] See p. 67 *supra*.

[162] Two decades of official racism expressed in word and deed by Virginia politicians and administrators, see B. Muse, Virginia's Massive Resistance (1961); W. Gates, The Making of Massive Resistance (1964); pp. 18-22 *supra*, has had its effect upon Virginia's white population. See note 148 *supra*. We have previously remarked upon the continuing practice of housing discrimination against blacks by private sellers and real estate brokers (see pp. 33-35 *supra*). We also note the ways in which the white citizens of Richmond, Chesterfield and Henrico have consistently exercised any options made available to them so as to avoid

strong incentive to white flight and a strong disincentive to white immigration. The expectable response of Virginia whites to these stimuli[163] completes the vicious circle that began with, and now intensifies, the perception on the part of blacks and whites alike that the dual system is being continued behind the shelter of school division lines.

(3) Compelling evidence sustains the District Court's findings that racial discrimination in housing is pervasive throughout the greater Richmond area.[164] This discrimination—some of it private, some fostered by governmental agencies[165]—was properly viewed by the District Judge as a factor in his decision that a

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intercourse with blacks: For example, under "free choice" plans, in each school division, whites remained in traditionally white schools or relocated if those schools underwent more than token integration (see pp. 11-16 *supra*; note 151 *supra*); and after the interim plan was implemented in Richmond for the 1970-71 school year, white Chesterfield parents of students assigned to Richmond schools pursuant to the 1970 annexation decree successfully sought to re-enroll their children in Chesterfield schools (A. 485-88). This prevalent climate of resistance to school desegregation is reflected in, and encouraged by, the hostile statements of incumbent public officials (see A. 671-75). Given the decision of the Court of Appeals establishing school division lines as absolute barriers to pupil assignment for desegregation, it is hardly improbable (especially in light of the varied and ingenious anti-integration tactics employed by the Commonwealth in the past, see note 155 *supra*), that white parents will now leave Richmond, new migrants to the area will tend even more than in the past to settle in the counties rather than the City, and additional exclusionary measures strictly limiting the number of blacks entering the counties will be devised.

[163] See pp. 30-35 *supra*.

[164] See pp. 33-35 *supra*. The Court of Appeals accepted these findings (462 F.2d, at 1065, Pet. A. 572), and thought it "deplorable" that "there has been housing discrimination in all three units" (462 F.2d, at 1066, Pet. A. 575). See also note 101, para. 3, *supra*.

[165] The Court of Appeals also accepted the District Court's findings of governmental involvement in housing discrimination. (462 F.2d, at 1065, Pet. A. 572.)

desegregation plan limited to the boundaries of the City of Richmond would be ineffective:

(a) Widespread discrimination of this sort attests eloquently to racial attitudes in whose light the continuation of predominantly black Richmond school facilities will be perceived as the perpetuation of a dual system of inferior Negro and superior white schools.

(b) Such discrimination, together with other patterns of racially discriminatory behavior by whites,[166] forcefully supports the District Court's predictive judgment that a desegregation plan confined to Richmond City would accelerate the development—already well advanced[167]—that is turning the City into an all-black enclave. The court could therefore conclude, as it did, that any plan not embracing the counties would "contain the seeds of [its] . . . own frustration," [168] and that "the only remedy promising of immediate success—not to speak of stable solutions—involves crossing [the county] . . . lines." [169]

(c) In the context of a region so seamed with racial discrimination, it was proper for the District Judge to take account of the tendency of a Richmond-only plan to encourage exclusionary practices in the counties,[170] with the result that school division

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[166] See note 162, *supra*.
[167] See pp. 30-33, 67-68 *supra*.
[168] 338 F. Supp., at 103, Pet. A. 237.
[169] 338 F. Supp., at 100, Pet. A. 230.
[170] By promising whites safe haven behind school district lines, the Fourth Circuit's decision will unquestionably encourage them to seek such havens out and, once there, to employ every public and private means at their disposal to keep them as white as possible. Some of these means (such as rejection of school district consolidation proposals, of public housing projects, of zoning variances for uses threatening to attract black employees) are

> boundary lines would be used as bulwarks of segregation to lock Richmond's black population still more tightly into the self-perpetuating isolation of the center-city ghetto.[171]

"The weighing of these factors to determine their effect upon the process of desegregation is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge." *Wright*, 407 U.S., at 466. Here, as in *Wright*, the District Court's conclusion that to treat Richmond and the counties as separate universes for the purposes of *Brown* would "actually impede the process of dismantling the existing dual system" (*ibid.*) must be respected.[172]

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essentially undetectable; others (such as inflation of property values by the premium paid to purchase the assurance of all-white schools) are innately uncorrectable; still others (such as intimidation of prospective black occupants) are correctable in theory but not in fact. It is one thing, as this Court said in *Swann*, 402 U.S., at 22, not to load a school case with more baggage than it can carry; but it is quite another, as the Fourth Circuit has done here, in deciding a school case, to throw the baggage out in the road where it will foreseeably cause these sorts of "accidents."

[171] The processes of containment, by which blacks are essentially confined to the urban center of the metropolitan area, are developed in the record and summarized in Appendix F, *infra*.

[172] The District Judge in the present case undertook an extraordinarily careful and thorough analysis of all the evidence in reaching his determination. A voluminous record was made in extensive hearings because of the court's desire to hear any evidence which the parties considered relevant (*e.g.*, 26 R. 143). The court then undertook to make detailed, exhaustive factual findings so that the basis for its legal ruling would be clear, and in the course of those findings explicitly resolved testimonial conflicts (338 F. supp., at 115-16, Pet. A. 263; see also, 338 F. Supp., at 202, 203, 206, Pet. A. 456, 466). Throughout the proceedings, the court declined to reach judgments without thorough evidentiary presentations (*e.g.*, 325 F. Supp., at 830 n. 1, Pet. A. 110; 51 F.R.D., at 54-55, Pet. A. 143; 338 F. Supp., at 193, Pet. A. 435) which would familiarize the court with relevant local conditions. And the court considered the matter for four months after the close of the proof before rendering its ruling. In sum, the history of these proceedings and the record reveal a most intensive and comprehensive consideration of all facts and circumstances by the local district judge.

The present case is, indeed, a far stronger one for sustaining the District Court's discretion than was *Wright*. For, compared with the staggering city-county racial disparities and other intractable problems besetting the court below in its efforts to desegregate the public schools in the Richmond area, the difficulties involved in desgregating Greensville-Emporia pale into insignificance. To be sure, in *Wright* "the city and county constituted but one unit for the purpose of student assignments during the entire time that the dual system was maintained." (407 U.S., at 459-460). But the relevance of that fact in the Greensville-Emporia context was to establish that the city and county were appropriately perceived by all concerned as a single educational community within which schools of differing racial concentration would be racially identifiable. Here, the fact of previous political unification is absent, but its place is supplied by the several factors itemized above, on the basis of which the District Court found factually that black Richmond schools and white county schools would be racially identifiable within the historical and practical context of metropolitan Richmond.

Nor is it important that *Wright* involved an affirmative act of withdrawal by the city, whereas here the counties are merely holding aloof from Richmond along previously established boundary lines. That difference might be significant if the issue in *Wright* and in the present case were one of constitutional violation. But, as we have seen,[173] it is not. The question in both cases is whether school authorities have adequately met their obligation to abolish dual systems formerly maintained in unquestionable violation of the Constitution. Such an obligation comports a duty of affirmative action;[174] and, in a situation where affirmative action is required, the plea of mere inaction is no defense.

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[173] Pp. 56-58 *supra*.
[174] See pp. 79-80 *supra*.

CONCLUSION

The power of a federal district court to cross state-created school division lines where necessary to enforce the federal constitutional rights declared in *Brown* is manifest. On this record, in view of the overwhelming problems involved in dismantling the dual school system of Richmond, Virginia—problems which, exacerbated by the eighteen-year resistance of Virginia state and local school officials to *Brown*,[175] assumed "a greater magnitude

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[175] A variety of changing circumstances since 1954, some flowing directly from Virginia's course of resistance to *Brown* and others which commenced independently but have become inextricably entwined with the former, have created new obstacles to the elimination of school segregation in the greater Richmond area through traditional means. The major factors have been discussed previously in separate fashion and we shall attempt here merely to collect and summarize them.

(a) The striking demographic change within Richmond since 1954 (pp. 30-33 *supra*) has altered the guidepost by which substantial internal disproportion may be gauged from less than 50% black to about 70% black. The same period of time has also witnessed a contrasting reduction in black proportion among the county school systems. If, as this Court suggested in *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490 (1972), the District Court was obliged to consider the likelihood that proposed plans would cause resegregation of the public schools, then he could not fail to perceive the significant danger that implementation of separate plans for the three divisions would result in such resegregation.

(b) Concurrently with the racial changes just noted, the counties surrounding the City of Richmond became increasingly urbanized as they grew significantly in population after 1950. The entire area acquired a new character of social and economic unity (see pp. 25-29 *supra*). As relationships between county residents and city or *vice versa* became more complex, it became increasingly difficult in a realistic, practical, sense for the district court to evaluate a plan for one division without considering its impact upon the others. *Cf. Wright*, at 468. See also pp. 92-95 *supra*.

(c) The persistent efforts of public officials throughout the period to preserve segregation at all costs (see pp. 18-24 *supra*) generated the forces described at pp. 88-91 *supra*, which made the elimination of racially identifiable schools through piecemeal approaches all the more difficult.

(d) Finally, the harm engendered by having had yet another generation of schoolchildren socialized, by their experiences, to

in the present than existed at an earlier date" (338 F. Supp., at 91, Pet. A. 210)—the District Judge did not abuse his discretion in the exercise of that power. The judgment of the Court of Appeals should therefore be reversed.

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separatism (and this generation having been told that the law of the land forbade that separatism), had to be taken into account by the district court. It is in this context, in particular, that the district court's concern to avoid "sprinkling" or token desegregation is significant.

APPENDICES

APPENDIX A

The Constitutional Basis of the District Court's Desegregation Order

Throughout its opinion, the Court of Appeals repeatedly treats the District Court's decree as one designed to achieve "racial balance" rather than constitutionally compelled desegregation (see 462 F.2d, at 1060, 1062-64, 1068, 1069, Pet. A. 562, 565, 567-70, 578-79, 580). Closely inspected, however, this does not mean what it appears to say. It does not mean either that the District Court undertook to pass beyond the pale of "constitutional violation" into the fields of "educational policy," *Swann*, 402 U.S., at 16, or that the District Court's decree in fact strayed into the educational policy field.

If the Court of Appeals did think that the District Judge was proceeding on some theory of obligation or power to dictate a non-constitutionally-commanded "racial balance," then its discussion of state school division organization, Virginia's supposed law and tradition of local school administration, the Tenth Amendment, and about ninety-nine percent of its twenty-page opinion for reversal was unnecessary. Reversal was compelled by one sentence quoting *Swann* for the obvious proposition—which the District Court here manifestly understood—that "judicial powers may be exercised only on the basis of a constitutional violation," *Swann*, 402 U.S., at 16. The contradistinction between mere "racial imbalance" and "state-imposed segregation in violation of *Brown I*." *Swann*, 402 U.S., at 17-18, did not escape the District Judge, however; and the Court of Appeals could not conceivably have thought it did. From the inception of his opinion and throughout all that follows,

Appendix A

Judge Merhige makes uncontestably clear what he is holding:

> The Court concludes, in the context here presented, that the duty to take whatever steps are necessary to achieve the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools is not circumscribed by school division boundaries created and maintained by the cooperative efforts of local and central State officials. The Court also concludes that meaningful integration in a bi-racial community, as in the instant case, is essential to equality of education, and the failure to provide it is violative of the Constitution of the United States. [338 F. Supp., at 79-80, Pet. A. 185-86]

The Court of Appeals concedes that the District Court disclaimed any intention of imposing a "fixed racial quota" by its adoption of the Richmond School Board's desegregation plan (462 F.2d, at 1063-64, Pet. A. 569-70). But it concludes that "the adoption of the Richmond Metropolitan Plan in toto by the district court, viewed in the light of the stated reasons for its adoption, is the equivalent, despite disclaimer, of the imposition of a fixed racial quota" (462 F.2d, at 1064, Pet. A. 570). The key to this sentence is the Court of Appeals' own view of what the "adoption of the Richmond Metropolitan Plan in toto" implied: namely, that, insofar as the plan went beyond the Richmond city line, it went beyond the Constitution. For, apart from that view, it could not be said—and the Court of Appeals does not say—that the "use made of mathematical ratios [in the Metropolitan Plan] was . . . more than a starting point in the process of shaping a remedy," *Swann*, 402 U.S., at 25, or that the District Court required "as a matter

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of substantive constitutional right, any particular degree of racial balance or mixing," *id.*, at 24.

To the contrary, the record reflects that the task the District Court set for itself was not the elimination of "racial imbalance," but the lasting eradication of vestiges of state-imposed segregation; and the particular means embodied in the District Court's decree, *i.e.*, adoption of the Richmond School Board's Metropolitan Plan, resulted from the shape given the litigation by the parties, not the Court.

In the first place, the Metropolitan Plan originated with the Richmond School Board—not the District Court—as a means of effectively desegregating schools (A. 247-49).[18] While the outlines of the plan were devised, to be sure, with a consciousness of the overall racial proportions of students in the three divisions together, mathematical balance was not a goal; rather, the plan was shaped by practical considerations. For example, percentages of black and white students in Subdivision Six (southern Chesterfield County) differed significantly from the overall ratio, and from those of the other subdivisions, a fact accounted for by the low density of population and greater geographical area of the subdivision (A. 205, 231-32). Hypothetical pupil exchanges between schools within a subdivision or immediately adjacent thereto, to be based on a birthday lottery, were selected by a computer programmed to equalize bus rides rather than to achieve precisely the same percentage of black and white students at each school (A. 213-18). And the results reflect variances in projected ratios at in-

[18] Dr. Little testified that he had not voiced the possibility of a metropolitan school system in the Richmond area until the duty to *effectively* desegregate schools had been made unmistakably clear by the district court's rejection of the HEW plan (see pp. 36-37 *supra*) (A. 264).

dividual schools ranging between 20% and 40% black in all subdivisions (RX 63; A. 201-06, 214).

Second, the same awareness of the overall ratio which guided Dr. Little in the preparation of the Richmond Board's plan characterized the response of Henrico County educators to HEW's 1971 directive to desegregate Central Gardens Elementary School: the school was clustered with four predominantly white facilities so that each would enroll about 30% black students, rather than being paired with a single white facility (which would have resulted in creation of two majority-black schools) in order to develop a stable desegregation plan (A. 592-95, 970-71).

Third, the Richmond School Board's Metropolitan Plan, which the district court approved, was the *only* plan of inter-division desegregation put before the court by any of the parties. (See Appendix B *infra*.) None of the State or county defendants has ever suggested a plan which would, for example, result in greater variances from the overall ratio by involving fewer schools.

The district court's opinon, from its beginning to its end,[2a] consistently focuses upon the elimination of racially identifiable schools, not the achievement of racial balance.

[2a] *E.g.*, 338 F. Supp., at 79-80, Pet. A. 185-86:

> . . . achieve the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools . . .
>
> . . . great disparities in 1971 racial composition, making both individual facilities and entire systems racially identifiable . . . .

338 F. Supp., at 230, Pet. A. 519-20:

> While the viable racial mix contemplated by the plan is educationally sound and would indeed result in a unitary system, variations from that suggested viable mix may be unavoidable. All parties are admonished that it is not the intention of the Court to require a particular degree of racial balance or mixing. If in the implementation of the plan improved modifications seem appropriate, the Court stands ready to entertain them.

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Appendix A

The significance of the court's own analysis is even greater than in the normal case, for the district judge here was particularly sensitive to the impact of racial disproportion upon desegregation plans—also having been the district judge in *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972).

Finally, the Court of Appeals' portrayal of a district judge bent upon attaining an artificial, absolute "racial mix" seems at least inconsistent with the district court's disinclination to reach out to include Hanover County in a greater Richmond area desegregation plan (338 F. Supp., at 193, Pet. A. 435).

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APPENDIX B

The Basis of the District Court's Approval of Consolidation as a Means of Inter-Division Desegregation

As indicated in footnote 66 to the body of the Brief, during the course of pretrial proceedings after joinder of the state and county defendants, counsel for the Richmond School Board announced to the court and to all parties that Richmond would present a metropolitan desegregation plan as a part of its case (see 34 R., 4/16/71 Tr. 34-36). The District Court thereupon directed that the Richmond proposal be made available to counsel in advance of the commencement of the hearings, so that it could be examined by them and so that the state and county defendants could suggest alternative forms of relief more acceptable to them if relief were to be granted (A. 136-42). The court suggested that administrators from the three school divisions confer for the purpose of devising the best form of inter-division plan (A. 141). However, despite a written invitation from counsel for the Richmond School Board to counsel for the County Superintendents, no meetings were held, nor did the county systems' administrators make any attempt to devise their own alternatives (A. 1009-10).

Among all the parties, only the Richmond School Board offered a plan, and it was this Richmond School Board plan calling for consolidation that the District Court eventually embodied in its opinion and order. *Cf. United States v. Board of Education of Baldwin County*, 423 F.2d 1013 (5th Cir. 1970). However, the District Court did not merely accept whatever was put before it. It expressly found the plan feasible (338 F. Supp., at 191, Pet. A. 431-

32) after receiving not only the testimony of its designer that the consolidation form of desegregation plan was selected for reasons of economy and efficiency (A. 195, 197-98, 240) but also information concerning the successful functioning of an existing Virginia division (Fairfax County and City) which enrolled more students than proposed for the new division in the Richmond Board's plan, and which utilized the same sort of decentralized subdistricting proposed by that plan (A. 481-82, 1045). Further, the District Court did not simply approve the plan and direct its implementation. It required a lengthy, detailed and specific planning process to be carried out under the supervision of the State Board of Education, with periodic reporting to the court well in advance of scheduled implementation, to insure that the desegregation plan could and would be smoothly implemented (338 F. Supp., at 246-47, Pet. A. 539-43). Most important, the District Court emphasized its readiness to consider modification of its order, and the plan, in any respect:

The court's opinion and order state that "with the cooperative efforts of the educators within the proposed Metropolitan Plan, perhaps an even better plan will emerge" (338 F. Supp., at 115, Pet. A. 262); that the Court stands ready at any time to consider any proposed modification of the plan to be approved" (338 F. Supp., at 230, Pet. A. 519; see also, 338 F. Supp., at 193, Pet. A. 435); and that the reason why the court finds it "necessary . . . not to await any proposed modifications, but to order the plan to be implemented" is in order that "a metropolitan school system [providing effective desegregation] will be in effect for the commencement of schools in September, 1972" (338 F. Supp., at 115, Pet. A. 262). None of the state and county defendants has ever availed itself of the

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opportunity to present the District Court with an inter-division desegregation plan based on some other method than consolidation. Although these defendants intimated a wish to do so in their stay application to the Court of Appeals (A. 1347-48), they took no steps in that direction even after the Court of Appeals directed continuation of planning toward ultimate effectuation of the Richmond Board's plan pending determination of the appeal. (Pet. A. 553-56).

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APPENDIX C

The Role of Virginia State School Authorities in School Administration and Policy Making

The Virginia State Board of Education and the State Superintendent of Public Instruction are responsible for the general supervision of all public education in the State. Va. Code Anno § 22-2 (Repl. 1969). By law and in practice, the State Board establishes educational policy in a wide variety of areas and its mandates are carried out by the State Superintendent of Public Instruction and the staff of the State Department of Education. In addition, the persuasive power of the State Board of Education as Virginia's leading educational institution is great.

The Virginia Constitution itself, after providing that "[t]he general supervision of the public school system shall be vested" in the State Board of Education, Article VIII, Section 4, lists as the first of the powers and duties of the Board:

> Subject to such criteria and conditions as the General Assembly may prescribe, the Board shall divide the Commonwealth into school divisions of such geographic area and school population as will permit the realization of the prescribed standards of quality and shall periodically review the adequacy of existing school divisions for this purpose.

Article VIII, Section 5a.[1c]

[1c] The State Board never had an opportunity, after enactment of the new Constitution, to examine the adequacy of school divisions because the General Assembly of Virginia, with knowledge of possible impact on this lawsuit (A. 942, 944), immediately required that every city and county be named a separate school division. Va. Code Anno. §22-30 (Supp. 1972). Standards of quality in

Appendix C

By statute or constitutional provision the State Board of Education must establish minimum criteria for local school divisions: it describes the qualifications for division superintendents, Va. Code Anno. § 22-31 (Repl. 1969); it establishes the minimum salary for those officials (which cost is shared by the State and the local division), Va. Code Anno. § 22-37 (Supp. 1972); it establishes the minimum length of the school year for which a local division must operate in order to be eligible for State aid, Va. Code Anno. § 22-117 (Supp. 1972); it establishes the minimum number of pupils required to operate a school, Va. Code Anno. § 22-6 (Repl. 1969); it issues bylaws and regulations governing pupil transportation, Va. Code Anno. § 22-276 (Repl. 1969); it sets rules and regulations for high schools, Va. Code Anno. § 22-191 (Repl. 1969); it prescribes textbooks, Va. Code Anno. §§ 22-295, *et seq.* (Repl. 1969); and it certifies teachers for employment by local divisions, Va. Code Anno. § 22-202 (Repl. 1969).

The State Board of Education and officers of the State Department of Education perform other functions with direct effect upon the conduct of local educational systems: the State Board may appoint division superintendents in the event of vacancies which are not promptly filled by division boards, Va. Code Anno. § 22-33 (Supp. 1972); the Virginia Public School Authority, successor to the Literary Fund, creates a market to permit school expansion by purchasing school district bonds, Va. Code Anno. §§ 22-29.2

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education were adopted by the State Board in 1971 (SX 8). By statute, local divisions are required to levy a school tax sufficient to maintain those standards, Va. Code Anno. §22-126.1 (Supp. 1972). The State Board of Education through the State Attorney General may compel appropriation of and sufficient funds to meet the standards, Va. Code Anno. §22-21.2 (Supp. 1972).

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to 22-29.15 (Supp. 1972);[2c] the Superintendent of Public Instruction must approve all school building plans and specifications, Va. Code Anno. § 22-152 (Repl. 1969), and prepares model specifications and plans for use by local divisions, Va. Code Anno. § 22-166.1 (Repl. 1969);[3c] indeed, the State Board "is authorized and required to do all things necessary to stimulate and encourage local supervising activities and interest in the improvement of the elementary and secondary schools . . ." Va. Code Anno. § 22-21 (Repl. 1969).

Virtually the only area related to education in which the State Board and Department did not have, or would not accept, responsibility and leadership was the desegregation of the public schools. The assistant State Superintendent who served as the liaison between the United States Department of Health, Education and Welfare and the State Education Department declined to express an opinion as to whether strong support for compliance with the law on the part of State Education officials would not have eased the problems faced by local school systems in meeting their affirmative constitutional obligations (A. 699-700). But the Chairman of the Richmond School Board felt that if the State Board had led the way, Richmond (and presumably other school districts) would have complied (A. 911-12).

[2c] The State has also made special appropriations for school construction purposes. See Va. Code Anno. §22-146.1 (Repl. 1969).

[3c] See SX 4.

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APPENDIX D

The Practical Operation of the District Court's Desegregation Order

The detailed order of the district court requires execution of the various steps necessary to consolidate the Richmond, Chesterfield and Henrico school divisions in order to implement the approved plan of school desegregation (338 F. Supp., at 244-46, Pet. A. 536-40). It is noteworthy that the entire process is completely in accord with, and guided by, existing Virginia law and practice. No part of the Richmond School Board's plan required the district court to ignore policies and procedures established by Virginia statutes.

Under Virginia law at the time of the district court's decree[1d] two or more school divisions may be designated a single school division by request of their school boards and the governing bodies of the political jurisdictions which they serve, upon approval of the State Board of Education (Va. Code Anno., §22-30 (Supp. 1972)). The district court's order requires the defendant county school boards and Boards of Supervisors to make such a request, and the State Board to approve it (338 F. Supp., at 245, Pet. A. 538). Virginia law also provides that when such a single division is created, composed of more than one political subdivision, it *must* be operated and administered just as proposed in the Richmond School Board's plan: under one school board responsible for the entire area, with one superintendent, and on a unified basis (Va. Code Anno., §22-100.1 (Supp. 1972)).

Virginia statutes specify all of the relevant mechanisms for creation and administration of the consolidated divi-

[1d] See Appendix E *infra*.

sion. The number, term, salary, and method of appointing school board members is established by Virginia law, Va. Code Anno., §§22-100.3, -.6 (Supp. 1972); Va. Code Anno., §22-100.4 (Reply 1969)). The school board is given corporate status (Va. Code Anno., §22-100.5 (Repl. 1969)) and authorized to receive title to all property formerly belonging to the school boards of the individual divisions which were consolidated (Va. Code Anno., §22-100.7 (Supp. 1972)). The district court's order directs composition of a school board and transfer of school property to the new board (338 F. Supp., at 245, Pet. A. 539).

Virginia statutes settle the most important potential financial dispute affecting the operation of a consolidated division by requiring the *pro rata* allocation of both capital and operating costs (Va. Code Anno., §22-100.9 (Supp. 1972)). The State Board of Education is given authority to promulgate such other financial regulations as may be appropriate, and to designate a fiscal officer for the combined division should the local agencies be unable to agree on a selection prior to consolidation (Va. Code Anno., §§22-100.8, -.10 (Repl. 1969)). (See 338 F. Supp., at 246, Pet. A. 538.)

In all of these respects, the district court's decree requires nothing more—or less—than compliance with Virginia's educational policy as established in its statutes.

The remaining portions of the decree (338 F. Supp., at 246-48, Pet. A. 540-45) are more typically found in federal court desegregation decrees: they require that the defendants fill in the details of the plan by making specific proposals for administrative structure, pupil and faculty assignment, transportation routes, etc. The decree also invites submission of such modifications of the Richmond School Board's plan as may be desired by the state defendants or

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the governing board of the new school division (338 F. Supp., at 246, Pet. A. 541).

The consolidated system contemplated by the Richmond School Board's Metropolitan Plan is neither unique to Virginia practice nor foreign to the experience of the defendants in the case. In addition to state officers' familiarity with public education in Virginia, the current Superintendent of Schools of Chesterfield County came to his present position after having served as a supervisor for one administrative subdivision of the Fairfax City-Fairfax County school system, which enrolls over 133,000 students (A. 481-82, 491-92).

The Court of Appeals' principal practical objections to the plan are that (1) the new division would be large (the second largest in the state), and (2) it would be funded by the governing bodies of three separate political subdivisions. (462 F.2d, at 1062, 1068, Pet. A. 566, 578.) Further matters relating to size are set forth in footnotes 67 and 100 to the body of the Brief. Fiscal dependency upon three local political jurisdictions, rather than one, (1) represents a difference only in degree, not in kind, from the more general predicament of Virginia school divisions because they all lack independent taxing authority;[2d] and (2) is apparently thought workable by Virginia lawmakers, since it characterizes the consolidated divisions for which Virginia law provides. Significantly, the new Constitution of

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[2d] Indeed, the expert witnesses who criticized the Metropolitan Plan because the new school division would be funded by three political subdivisions also expressed the view that all Virginia school divisions should be given independent taxing authority (A. 1085, 1128, 1176). One said he had not made any study to determine if financial problems of the sort he envisioned had developed in the operation of joint schools for black students, funded by two or more political jurisdictions, in Virginia (A. 1248).

Appendix D

Virginia, adopted in 1971, provides a mechanism whereby division boards and local governing bodies of political subdivisions may be required to appropriate sufficient funds as will allow school divisions to meet the minimum standards of quality in education adopted by the State Board of Education (A. 555; see note 1c, *supra*).

APPENDIX E

The History of Localism and Centralism in Virginia Educational Administration and Policy

The Court of Appeals' opinion takes the view that public education in Virginia has always been a matter of purely local concern:

> The power to operate, maintain and supervise public schools in Virginia is, and has always been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education. *School Board of Prince Edward County* v. *Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963). Indeed, the operation of public schools has been a matter of local option. *See Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). (462 F.2d, at 1067, Pet. A. 576.)

We here examine that conclusion in some detail, because it seems to us that the Court of Appeals attributes to Virginia a policy of individual school-division sanctity that does not exist. See also Appendix C, *supra*.

Virginia's public schools were, at the outset, entirely local in character and operation. The earliest education statute of the Commonwealth (1797) merely authorized county officials to construct and operate schools with revenues from county taxes. Not until 1869 did the Virginia Constitution and laws create "school districts" and require the establishment of a State-wide public school system. See *Board of Supervisors* v. *County School Board*, 182 Va. 266, 268-69, 275, 28 S.E.2d 698, 699, 702 (1944). At the same time, however, a policy of segregation in the public schools

was adopted and enforced on a State-wide basis (see note 25 to the body of the Brief).

The subsequent development of Virginia's educational system has been marked by increasingly larger units of administration and operation as well as the development of State institutions to regulate and standardize education.[1e] Indeed, as early as 1962, a federal district court concluded that a county's public schools were "primarily administered on a statewide basis. A large percentage of the school operating funds is received from the state. The curriculums, school textbooks, minimum teachers' salaries, and many other school procedures are governed by state law . . . ." *Allen* v. *County School Bd.*, 207 F. Supp. 349, 354 (E.D. Va. 1962).[2e]

However, the actions of Virginia officials, including state educational authorities, have made manifest the hierarchy

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[1e] In 1922 the General Assembly abolished the prior system of separate school districts congruent with magisterial (county subunit) districts following the recommendation of the State Superintendent of Public Instruction that this be done in order to eliminate "[p]urely artificial differences" among the various districts. *Annual Report of the State Superintendent, 1917-18*, at 14 (PX 124). About the same time, the legislature established the policy of "school divisions" staffed by a State official as Superintendent (whose salary was to be shared between local jurisdictions and the State). Although the State Board of Education did not exercise the authority it had prior to 1971 to place more than one "district" in a "division," it has consistently supported consolidation into larger operating units. In 1969, the Board said:

> The State Board, therefore, has favored in principle the consolidation of school divisions with the view to creating administrative units appropriate to modern educational needs. The Board regrets the trend to the contrary, pursuant to which some counties and newly formed cities have sought separate divisional status based on political boundary lines which do not necessarily conform to educational needs. (RX 82)

[2e] The current role of State authorities in Virginia is described in Appendix C *supra*.

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of values when the need to maintain segregation conflicted either with the supposed commitment to localism or with the increasingly centralist tendency of educational administration. For example, the State Board of Education did not avail itself of its authority to consolidate separate school districts into single school divisions despite avowed State policy favoring consolidation; almost without exception, the State Board joined only consenting districts at their request.[3e] On the other hand, state authorities actively endorsed and facilitated the establishment and operation of joint schools for blacks which drew their students from within several separate school districts and over distances which sometimes required the black children to board at the school during the week. (See pp. 22-23 *supra*.) With the express sanction of state authorities, county school systems before and after *Brown* sent their black resident pupils to other school divisions (including some in other States) and paid tuition for them (see pp. 23-24 *supra*).

The State showed the most blatant disregard for its supposed tradition of local public education in its reaction to the *Brown* decision. The General Assembly of Virginia restructured control of education in the Commonwealth, subjecting all phases of school operation to centralized control and direction in an effort to maintain pupil segregation; the Pupil Placement Board was established to keep control of all Virginia public education in Richmond (see pp. 19-20 *supra*). These and other devices effectively prevented any local school divisions from voluntarily undertaking desegregation in accordance with *Brown*, and restricted the elimination of segregation to those school divisions involved in federal court litigation.

[3e] See note 1e *supra*.

Appendix E

When the devices of extreme centralization represented by the school closing and pupil assignment laws (see notes 21-24, *supra*, and accompanying text) failed to prevent desegregation, Virginia accepted the inevitability of tokenism but did all within its means to minimize the amount of integration. A combination of centralist and localist policies was designed, fluctuating from time to time in whatever manner seemed to promise the most successful avoidance of *Brown*. Thus, although pupil assignment powers were returned in 1961 to local boards, criteria essentially identical to those of the Pupil Placement Board (which dealt explicitly with race) were promulgated by the State Board of Education (see note 26 *supra*). At the same time, the resources of the State were made available to school districts for the purpose of perpetuating segregation: they received assistance in designing transportation systems to serve segregated schools, legal aid in resisting desegregation litigation, and loans and grants of State funds to construct and operate additional segregated schools either within existing divisions or as joint facilities for black students (see pp. 21-23 *supra*). State officials continued to urge defiance of this Court's mandates and set the pattern by their own activities, as by holding segregated state-wide personnel meetings (A. 535).

At the local level, the new tolerance allowed local boards —coming only two years after the Governor had closed the Norfolk schools rather than allow them to open on an integrated basis (see note 22 to the body of the Brief)— was demonstrated in Prince Edward County, which was permitted to end its public school system to avoid desegregation despite a State constitutional provision requiring the establishment of a system of free public schools (see notes 27, 28 to the body of the Brief, and accompanying

text). State authorities continued to function in support of segregation ever. in Prince Edward County, however, by distributing tuition grants and scholarships (see pp. 23-24 *supra*) enabling white pupils to attend either private schools or public schools in other divisions untainted by desegregation.

State authorities again receded to a position of secondary importance, however, after passage of the Civil Rights Act of 1964 and execution of a compliance agreement between HEW and the State Education Department—taking the position that they could do nothing more than advise with local school divisions (see p. 21 *supra*).

The final chapter in this history was written in 1971, after the adoption of a new Virginia Constitution containing a provision requiring the State Board of Education to divide the Commonwealth into appropriate school divisions "subject to such criteria and conditions as the General Assembly may prescribe," Article VIII, §5. After the filing of the joinder motion in this litigation, the 1971 General Assembly of Virginia amended Va. Code Anno., §22-30 so as to prohibit the State Board of Education from placing more than one political subdivision in a single school division without the consent of school boards and governing bodies involved—aware that the enactment could have some effect on this lawsuit (see A. 942, 944).

APPENDIX F

Forces Containing Blacks Within Richmond

The containment of blacks to the City of Richmond which haracterizes the development of the greater Richmond rea is apparent from the statistics of demographic change nemselves. Since 1940, the proportion of blacks in the ounties' populations has dropped while that in Richmond as significantly grown (see Table 3, at p. 30 *supra*). Vhile the causes of this concentration may not be simple nd some small numbers of blacks may escape their effects *f.* 462 F.2d, at 1066, Pet. A. 573-574), the forces which ombine to lock blacks generally into the City are identifi-ble on this record.

It must be kept in mind that the widening differential etween City and counties has been effected in a period of apid total demographic change (see pp. 30-31 *supra*). Vhile the counties were mainly rural, with small total opulations, they were relatively blacker than they are to-ay; but it is readily apparent that as they grew after 950 (see note 135 *supra*), blacks either did not or could ot participate in the suburban expansion.

This development is hardly surprising—and was readily reseeable—in light of the historic enforced segregation f blacks *within* Richmond and the resultant patterns of xpansion. Blacks have always been confined to pre-ribed sections of the City.[1f]

[1f] Indeed, well after this Court's decision in *Buchanan* v. *Warley*, 5 U.S. 60 (1917), the City of Richmond attempted to enforce ordinance limiting blacks to established neighborhoods. See *ty of Richmond* v. *Deans*, 281 U.S. 704 (1930). Discrimination as continued after judicial invalidation of the ordinance through e use of restrictive covenants and the practices of the real estate dustry. (See, *e.g.*, A. 497-98; pp. 33-34 *supra*.)

These were smaller in the past; they now have expanded under the pressure of a rising black population; but there are still areas of the City effectively restricted to whites (21 R. 32). The manner of expansion of black residential areas was established by these same discriminatory customs, however: always on the periphery of the ghetto rather than by colonizing new areas (see 338 F. Supp., at 73, Pet. A. 172 [reference to RX 18 at 1970 trial]). Prior to 1950, then, Richmond was characterized by a continually expanding black central ghetto and expanding white belts surrounding it (A. 666). See generally, K. & A. Taeuber, Negroes in Cities (1965).

What we have referred to as the process of suburbanization after 1950 is nothing more than the continuation of this pattern, now across invisible political boundary lines. The continuation of rampant discrimination against blacks in suburban housing is apparent from the figures, supported by the testimony, and accepted by the Court of Appeals (462 F.2d at 1065, Pet. A. 572). In the context of the historic cycle of racial residential transition in the City, this was enough to contain blacks to Richmond.

New mechanisms were now available, however. As the income gap between blacks and whites—itself a reflection of past educational deprivations in segregated school systems and continuing employment discrimination (see, *e.g.*, A. 186; PX 104-107e, 125)—widened, restricting the access of the poor to suburban housing generally meant restricting blacks (see note 158 *supra*). The Court of Appeals accepts the notion that the counties' refusal to permit low-income housing has contributed to the segregated pattern between City and suburbs.[2f] (462 F.2d, at 1066, Pet. A.

[2f] Although the Court of Appeals supposes "the possibility that in a heavily white county much of such housing would likely be

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.) Economic differences also combine with the lack of blic transportation available in suburban counties de-ndent upon automobile travel, to restrict access of the or (see A. 885-86).[3f]

These patterns of housing and economic discrimination uld, whether governmentally compelled or not, prevent ort to the use of political jurisdiction boundaries to ine school attendance areas if the greater Richmond ion were a single school division. *Brewer* v. *School Bd. Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968); *Swann* v. *rlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138 (4th . 1970), *rev'd on other grounds*, 402 U.S. 1 (1971). Yet Court of Appeals seems to have held them irrelevant e because Virginia has divided the greater Richmond a among three school units. (See 462 F.2d, at 1066, Pet. 574.) Thus, the Court of Appeals' peculiar view of the th Amendment seems to control this issue as well.

Not only have the forms of discrimination affecting adult groes described above played a substantial role in con-ng blacks to the City of Richmond, but the very tech-ues utilized by the school authorities of the three divi-ns since 1954 to perpetuate segregation have, by their ritable effect upon residential demography, contributed hat phenomenon:

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pied by low income whites," 462 F.2d at 1066, Pet. A. 574, e are relatively few low income families in the counties now note 158 *supra*) while nearly all public housing units within mond are occupied by black tenants (PX 39, 129; A. 614).

In 1969, 18% of all employees living and working in the mond SMSA travelled to work by public transportation—but of black employees did so. U.S. DEPT. OF COMMERCE, BUREAU HE CENSUS, CENSUS OF POPULATION: 1970, Detailed Character-s (G.P.O. PC (1)-48, 1972), pp. 1026-28, Table 190, Place of k During the Census Week, by Selected Characteristics: 1970.

Appendix F

We have described the development of the greater Richmond area's white suburbs as but an extension, across political boundary lines, of the process by which black neighborhoods have always expanded. In this context, the repeated conversion of formerly white Richmond school facilities to identifiably black ones, together with the extensive construction of new white schools in the counties,[f] operates to exacerbate the general demographic trend toward a black City surrounded by white counties. Indeed, the process is the analogy of that described by this Court in *Swann*, 402 U.S., at 20-21, whereby white city schools likely to become desegregated were closed [here converted to black schools] while new white suburban schools were constructed. See *Clark* v. *Board of Educ. of Little Rock*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

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[f] Contrary to the Court of Appeals' supposition that the counties' maintenance of segregated schools long after *Brown* could not have affected the residential mobility of blacks (462 F.2d, at 1066, Pet. A. 574), the county school systems did offer disincentives to black settlement in the newly urbanized areas of Henrico and Chesterfield adjacent to Richmond. Blacks who might have been able to defeat the attempts to bar them and have moved to these areas knew their children could not attend the schools located where they lived. Black students were assigned to small, often inferior and overcrowded facilities (see pp. 13-15 *supra*) and might be required to travel for an hour and a half or two hours to get to such distant schools (see note 100 to the body of the brief).

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